

IN THE SUPREME COURT OF VICTORIA  
AT MELBOURNE  
COMMERCIAL COURT

No.SCI 2012 7185

B E T W E E N:

**LAURENCE JOHN BOLITHO**

Plaintiff

and

**BANKSIA SECURITIES LIMITED (ACN 004 736 458) (RECEIVERS AND  
MANAGERS APPOINTED) (IN LIQUIDATION)**

and

**THE TRUST COMPANY (NOMINEES) LTD (ACN 000 154 441)**

Defendants

**THIRD FURTHER AMENDED STATEMENT OF CLAIM**

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Date of document:	15 September 2016
Filed on behalf of:	The Plaintiff
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**A. THE PLAINTIFF**

1. The plaintiff (**Bolitho**) is a depositor in and therefore owns debentures in the first defendant, Banksia Securities Limited (**Banksia**) and brings this proceeding as a group proceeding pursuant to Part 4A of the *Supreme Court Act 1986* (Vic) on his own behalf and on behalf of all those persons who were on 25 October 2012 holders of debentures (also called unsecured deposit notes and compendiously referred to herein as **Banksia debentures**), issued by Banksia and who suffered loss and damage as a result of the conduct of the defendants which is alleged below (**Banksia Group Members**).

### Particulars

There are more than 16,000 Banksia Group Members. So far as Bolitho is concerned, the facts are as follows:

- (i) on 1 April 2005, Bolitho invested \$8,000 and thereby acquired Banksia debentures, to be held for a term of 6 months, at an interest rate of 6.25%. As a result, Bolitho received Certificate of Debenture Stock No. 129340 from Banksia, dated 1 April 2005;
- (ii) on 3 October 2005, the amount of \$8,255.43 was rolled over for a further period of 6 months at 6%, as described in Certificate No. 140875;
- (iii) on 3 April 2006, the amount of \$8,504.26 was rolled over for a further period of 6 months at 5.75%, as described in Certificate No. 152622;
- (iv) on 3 October 2006, the amount of \$8,751.19 was rolled over for a further period of 6 months at 6.25%, as described in Certificate No.163886;
- (v) on 3 April 2007, the amount of \$9,026.04 was rolled over for a further period of 6 months at 6.5%, as described in Certificate No. 175148;
- (vi) on 20 June 2007, Bolitho withdrew \$1,000 from the investment;
- (vii) on 3 October 2007, the amount of \$8,296.24 was rolled over for further a period of 6 months at 6.75%, as described in Certificate No. 186094;
- (viii) on 3 April 2008, the amount of \$8,579.38 was rolled over for a further period of 6 months at 7.5%, as described in Certificate No. 196004;
- (ix) the investment was rolled over in October 2008 but the rollover certificate for October 2008 is missing;
- (x) on 3 April 2009, the amount of \$9,252.47 was rolled over for a further period of 6 months at 5.25%, as described in Certificate No. 213351;
- (xi) the investment was rolled over in October 2009, April 2010 and October 2010 but the certificates in respect of those rollovers are missing;
- (xii) on 6 April 2011, the amount of \$10,350.36 was rolled over for a further period of 6 months at 6.25%, as described in Certificate No. 273422;
- (xiii) on 11 November 2011, Bolitho rolled over a further \$2,283.00 with Banksia so that the amount of \$12,960.24 was invested for a period of 6 months at 6.15%, as described in Certificate No. 290355;
- (xiv) on 10 October 2012, the amount of \$11,662.10 was invested for a period of 6 months at 4.9%, as described in Certificate No. 316591. Bolitho does not know what Banksia did in respect of Bolitho's investment in Banksia debentures when it matured on 10 October 2012, but it has not been repaid to him in full.

Copies of the certificates are in the possession of the plaintiff's solicitor and may be inspected by prior appointment.

2. Upon the commencement of this proceeding there were (and there are today) more than seven persons who comprise the Banksia Group Members, and who respectively have claims against each of the defendants.

**B. THE DEFENDANTS**

## 3. Banksia:

- (a) is and was at all material times a corporation registered pursuant to the *Corporations Act 2001* (Cth) (**the Corporations Act**) and is capable of being sued;
- (b) carried on the business of raising monies from the public by offering and issuing Banksia debentures to investors pursuant to prospectuses, and then advancing the funds which it raised thereby to third party borrowers (**the Banksia business**), which business was:
  - (i) incorporated in 1968;
  - (ii) formerly known as Kyabram Housing Investments Limited and North Central Securities Limited; and
  - (iii) a substantial non-bank property lending business operating principally and widely known in rural Victoria, and particularly in the Goulburn Valley, Ballarat, Bendigo and the Western District;
- (c) was subject to the disclosure requirements of (inter alia) sections 706, 710, 728 and 1041E of the Corporations Act;
- (d) published annually prospectuses which were regulated by (inter alia) Part 6D.2 of the Corporations Act; and
- (e) was party to a debenture trust deed dated 12 December 1994, the trustee of which is and was at all material times the third defendant (**Trust Co**) and which regulated the issue of Banksia debentures and the conduct of the Banksia business;
- (f) operated the Banksia business pursuant to Australian Financial Services Licence number 227837, issued to it by ASIC (**the Banksia AFSL**), the conditions of which included clause 8 which stated the following:

- (i) the licensee must:
  - (A) be able to pay all its debts as and when they become due and payable; and
  - (B) either:
    - (1) have total assets that exceed total liabilities as shown in the licensee's most recent balance sheet lodged with ASIC and have no reason to suspect that the licensee's total assets would currently not exceed its total liabilities; or
    - (2) have adjusted assets that exceed adjusted liabilities calculated at the balance date shown in the licensee's most recent balance sheet lodged with ASIC and have no reason to suspect that the licensee's adjusted assets would currently not exceed its adjusted liabilities; and
  - (C) meet the cash requirement by complying with one of five specified options;

**(the Banksia AFSL Solvency and Liquidity Requirements)**

- (g) in and after March 2009 progressively acquired all of the assets (including all of the loans) and all of the liabilities (including all of the debenture debts) of Statewide Secured Investments Ltd (ACN 004 682 517) (**Statewide**) which assets, as at 31 December 2008 (the last audited accounts of Statewide prior to the acquisition in March 2009) included a loan portfolio valued at \$311,530,080, including 59 loans totalling \$56,454,218 which were in arrears as at 31/12/08 but in respect of which provisions of only \$447,374 had been made, being less than 0.15% of Statewide's loan book, and as at 30 June 2009 (the next audited accounts):
  - (i) comprised a loan portfolio valued at \$223,153,576;

- (ii) but included within that Statewide loan portfolio were past due loans valued at \$68,308,388, comprising 30.6% of the total Statewide loan portfolio;

**(the Statewide Acquisition)**

- (h) by reason of the existence of the Banksia AFSL and the Banksia AFSL Solvency and Liquidity Requirements alleged in (f) above, was subject to the provisions of Chapter 7 of the Corporations Act applicable to AFSL licensees.
4. On 25 October 2012, Messrs Tony McGrath, Joseph Hayes, Matthew Caddy and Robert Kirman of McGrathNicol were appointed as receivers and managers of Banksia and from that time onwards, Banksia ceased to take deposits from the public, or to issue, or redeem, or to pay any further instalments of interest which were due on, Banksia debentures.
5. Trust Co:
- (a) is and at all material times was a corporation registered pursuant to the Corporations Act and is capable of being sued;
  - (b) is and at all material times engaged in the business of providing trustee services;
  - (c) entered into a trust deed with Banksia dated 12 December 1994 (**the Banksia Trust Deed**), whereby:
    - (i) it was appointed by Banksia as trustee; and
    - (ii) it held a fixed and floating charge over all of the assets of Banksia, on trust for all of the holders of Banksia debentures, including all of the Banksia Group Members;
  - (d) in its capacity as trustee for the holders of Banksia debentures, owed the Banksia Group Members obligations under Part 2L.4 of the Corporations Act;

- (e) pursuant to a Trust Deed dated 12 March 1996, was also the trustee for the debentureholders of Statewide.

**C. THE STATEWIDE ACQUISITION: MARCH 2009**

- 6. Immediately prior to the Statewide Acquisition in March 2009:
  - (a) Statewide was a strong competitor of Banksia and the failure of Statewide would likely lead to a significant loss of confidence in Banksia because Statewide and Banksia were very similar companies;
  - (b) Statewide had issued its most recent prospectus on 29 February 2008 (**the Statewide Prospectus**);
  - (c) the Statewide Prospectus was due to expire on 28 March 2009;
  - (d) if Statewide was to issue any further debentures then it had to lodge a further prospectus with ASIC by 14 March 2009;
  - (e) some of Statewide's directors were refusing to sign off on a further Statewide prospectus in March 2009, due to their concerns about Statewide's financial condition; and
  - (f) Statewide was insolvent or about to become insolvent.

**Particulars**

These facts are disclosed in the evidence given in the Matter of the Public Examinations conducted by the Receivers and Managers of Banksia Securities Limited, SCI 2013 01315, in the Supreme Court of Victoria. A transcript was taken of the examinations and references to the transcript are made herein commencing with the letter "T", with the relevant page number(s) and line number(s) following. Documents from the Courtbook for the examinations are hereafter referred to by their volume number after the letter "V" and their page number(s) within that volume.

As to sub-paragraph (a): T 528.2 – 19; 626.15 – 24; 830.31 – 831.6; 937.9 – 21; 947.11 – 15; 948.26 – 31;

As to sub-paragraphs (b) and (c): T 599.15 – 31; 839.23 - 26;

As to sub-paragraph (d): T 839.18 - 30;

As to sub-paragraph (e): T 520.9 – 14; 753.16 – 18; 754.31 – 755.1; 830.5 – 8; 928.10 – 929.3; email from Godfrey to Mark Awender dated 8 February 2011 at V4.423;

As to sub-paragraph (f): T829.10 – 830.4; 832.4 – 10; 924.3 – 924.11 (Godfrey); Keating also held that view: T 755.7 - 13; Also V4.064 (email from Santilla to Godfrey dated 27/2/09) and V4.047 (Skewes' note dated 20/2/09 that Godfrey had informed the Banksia board of Statewide's insolvency)

7. Despite the matters alleged in paragraph 6, the Board of Directors of Banksia (**the Directors**):
- (a) resolved on 11 March 2009 to proceed with the Statewide Acquisition, subject to due diligence;
  - (b) undertook very limited due diligence of Statewide's loan book, which:
    - (i) took less than one working day to complete, namely from 8.30 am until 5pm on 12 March 2009;
    - (ii) comprised an assessment of only 30 Statewide loan files chosen at random out of the 698 loans in Statewide's loan portfolio;
    - (iii) was not the subject of any analysis by any of the Directors, apart from Godfrey;
    - (iv) was completed in such a short timeframe because otherwise Statewide's business would have ceased operating and it would likely have collapsed shortly thereafter;
  - (c) resolved on 13 March 2009 to proceed with the Statewide Acquisition without taking any independent accounting, legal or other external advice concerning:
    - (i) the solvency or viability of Statewide;
    - (ii) the extent of impairment of the loan portfolio of Statewide;
    - (iii) the reliability of the accounts of Statewide;

- (iv) the terms and conditions of the Statewide Acquisition.

**Particulars**

As to sub-paragraph (a): T 831.9 – 13; Minutes of meeting of Directors on 11 March 2009 at V4.99;

As to sub-paragraph (b)(i): T 843.22 – 25; T 598.30 – 599.4;

As to sub-paragraph (b)(ii): 851.20 - 24;

As to sub-paragraph (b)(iii): V4.126, being a report on the Statewide loan portfolio as a result of the purported due diligence conducted on 12 March 2009;

As to sub-paragraph (b)(iv): T 831.24 – 27;

As to sub-paragraph (c): Minutes of meeting of Securities HoldCo on 13 March 2009 at V4.123; T 753.23 – 25; 849.7 – 9; 943.27 - 31.

8. In resolving to enter into the Statewide Acquisition, the Directors acted on the basis that:
- (a) the provision of \$4.3 million for bad and doubtful debts in Statewide's balance sheet in March 2009 was (according to Godfrey) only slightly understated;
  - (b) Statewide had not reviewed its provision for bad and doubtful debts since 31 December 2008 and its directors had expressly refused to give Banksia any warranty as to its accuracy or sufficiency after that date;
  - (c) Statewide's bad or doubtful debts provision ought to be increased to \$5.5 million,

but the Directors did not undertake any analysis or seek any external advice whatsoever, either of the \$4.3 million bad and doubtful debt provision that was recorded by Statewide as at March 2009 or of the proposed provision of \$5.5 million.

**Particulars**

As to sub-paragraph (a): T 851.10 – 13 and V4.127;

As to sub-paragraph (b): T 852.6 – 13.

As to sub-paragraph (c): T 851.10 – 13.

9. Following the Statewide Acquisition, the Directors caused Statewide to pay a dividend on 25 June 2009 of \$1 million to Securities Holdco Ltd, Banksia's parent company.

**Particulars**

Minutes of Directors' meeting on 25 June 2009: V5.479; Statewide and Securities Holdco Annual accounts for 30 June 2009: V1.194.

10. Following the Statewide Acquisition, the Directors caused the following things to happen:
- (a) Statewide ceased accepting deposits from new debentureholders or rolling over debentures, as the 2008 Statewide Prospectus expired on 28 March 2009 and was not renewed;
  - (b) Statewide's debentureholders were offered rollovers of their Statewide debentures as they matured at their full face value into Banksia debentures of the same face value;
  - (c) those Statewide debentureholders who elected not to roll over were paid out by Banksia in cash at the full face value of their Statewide debentures;
  - (d) those Statewide debentureholders who rolled over (comprising a substantial majority of the Statewide debentureholders) received Banksia debentures on the rollover, equal to the face value of their Statewide debentures.

**Particulars**

T 860.16 – 862.17; Godfrey's Managing Director's Report to the Directors' Meeting in August 2009: V8.141 – 145; Godfrey's letter to Statewide's directors dated 18/3/09 (V4.191).

11. As the Statewide debentureholders referred to in paragraph 10(d) above rolled over into Banksia, the Directors authorized the progressive transfer of tranches of Statewide loans across to Banksia (i.e. Banksia was substituted for Statewide as the creditor in respect of such loans) in an endeavour to "match" the liabilities which were being incurred by Banksia by the issue of the new rollover Banksia debentures to former Statewide debentureholders who rolled over to Banksia.

**Particulars**

T 860.16 – 861. 4; 939.7 – 10; 950.3 – 7; V8.141 - 145.

12. When the Statewide loans were transferred in the manner alleged in paragraph 11 above, the Directors caused or permitted many non-performing or otherwise impaired Statewide loans to be recorded as assets in Banksia's accounts at values which were arrived at by adding the face value of the amount outstanding on the relevant Statewide loans, plus all arrears of interest at the time of the transfers, without regard to the likely recoverability, or the actual market value of, the loans so transferred and accordingly in breach of Australian Accounting Standard AASB 139: 'Financial Instruments: Recognition and Measurement', which applied to Banksia by virtue of s. 296 of the Corporations Act.

**Particulars**

T 634.3 – 16; 858.5 – 9; T 858.25 – 859.10; T 860.16 – 861.4;  
T 864.2 – 15. Godfrey's email to the Banksia directors dated  
13/3/09 contemplated this process: V4.129

13. By acting in the manner alleged in paragraphs 11 and 12 above, the Directors caused or permitted the transfer of many Statewide loans to Banksia at values which were higher than the 70% loan to security valuation limit (the LVR) which was imposed upon Banksia under clause 11.01(a)(ii) of the Banksia Trust Deed and such Statewide loans were accordingly transferred to Banksia in breach of the Banksia Trust Deed.

**Particulars**

T 860.27 – 861.7; Banksia Trust Deed.

14. The Directors did not transfer to Banksia those Statewide loans that they considered to be excessively impaired and accordingly those loans remained on the Statewide balance sheet. The Directors also purported to do this in respect of 'parts' of impaired Statewide loans (i.e. the 'good' portions of such Statewide loans were purportedly transferred to Banksia and the 'bad' portions were purportedly left behind in Statewide).

**Particulars**

T 635.8 – 17; 823.12 – 28. Godfrey's email to the Banksia directors dated  
13/3/09 contemplated this process: V4.129.

**D. UNDERWRITING BY BANKSIA OF LOANS IN THE BANKSIA MORTGAGE FUND**

15. On a date which is not known to the Plaintiff, but before 2009, Banksia entered into an arrangement with its related company Banksia Mortgages Ltd (**BML**), which was at all material times the responsible entity of a managed investment scheme known as the Banksia Mortgage Fund (**BMF**), whereby:
- (a) BML acted as loan manager and servicer of the loans advanced by Banksia. Banksia provided all of the funds in respect of each loan initially;
  - (b) if BML considered a mortgage loan to be an attractive investment for investors in BMF, it would arrange for Banksia's participation in the loan to be 'sold down' (in whole or in part) to investors in BMF, being retail investors, with each such loan becoming a 'sub-scheme' of BMF under the trusteeship of BML as the responsible entity of BMF;
  - (c) in the event that any such loan became non-performing or impaired, it was refinanced by Banksia, moved out of BMF and Banksia became once again the sole lender in relation to the loan. Retail BMF investors in such loans were offered the opportunity to invest in other BMF loans or be repaid in cash;
  - (d) in effect, Banksia was the undisclosed underwriter in respect of all impaired loans in the BMF portfolio;
  - (e) the Directors' policy was to ensure that retail investors in BMF were "*kept whole*"; and
  - (f) Banksia received no consideration for that underwriting and no benefit whatsoever came to Banksia from the underwriting, only detriment.

**(the BMF underwriting arrangement)**

**Particulars**

Affidavit of Warren James Shaw, Chief Executive Officer of the Banksia Financial Group, in the matter of Banksia Mortgages Ltd, Supreme Court

proceeding no. SCI 2013 03871 (**the Shaw Affidavit**), at paragraph 15. The BMF underwriting arrangement is also referred to at: T 63.4 – 65.2; 677.20 – 30; 680.22 – 681.31; 747.24 – 748.18; 749.8 – 18; 1239.4 – 1240.17.

16. Pursuant to the BMF underwriting arrangement, if a Banksia loan was deemed suitable for retail investors in BMF, but the LVR was considered to be too high, BML would, in some circumstances, divide the loan into parts by doing the following things:
- (a) part of the loan, called the `Tranche 1 monies`, would be advanced by BMF;
  - (b) the remainder of the loan, called the `Tranche 2 monies` would be advanced by Banksia, or by other lenders;
  - (c) the Directors caused the Tranche 2 monies to be subordinated to and to rank behind the Tranche 1 monies;
  - (d) pursuant to the subordination alleged in paragraph (c), the Tranche 1 monies were repaid in priority to the Tranche 2 monies; and
  - (e) after BMF ceased trading in October 2012, Banksia had an exposure of approximately \$124.5M to loans in the BMF portfolio, in respect of which \$96.4M was subordinated to the interests of BML and the investors in BMF.

### **Particulars**

As to sub-paragraphs (a)-(d), the plaintiff refers to the Shaw Affidavit at paragraph 32. As to sub-paragraph (e), the plaintiff refers to the Shaw Affidavit at paragraph 36.

17. None of the matters alleged in any of paragraphs 6 - 16 inclusive above was ever disclosed in any prospectus or other publication issued by Banksia, the Directors or any other person (**the Banksia undisclosed matters**).

### **E. BANKSIA PROSPECTUS LIABILITY CLAIMS**

18. Between 6 October 2009 and 25 October 2012 (the **Banksia Relevant Period**), Banksia offered Banksia debentures to the public by accepting new monies which were deposited in Banksia for fixed terms and at call by members of the public and by automatically

rolling over the fixed term deposits when they matured, using Product Disclosure Statements and supplementary Product Disclosure Statements (**PDS Documents**) which invited members of the public to deposit monies with Banksia and thereby take up Banksia debentures.

### **Particulars**

The PDS Documents were in writing and comprise the following:

- (i) Prospectus No. 16 dated 6 October 2009 (**Prospectus 16**);
- (ii) Supplementary Prospectus dated 11 February 2010;
- (iii) Prospectus No. 17 dated 15 October 2010 (**Prospectus 17**);
- (iv) Prospectus No. 18 dated 17 October 2011 (**Prospectus 18**);
- (v) Supplementary Prospectus dated 8 June 2012.

Rollovers were effected by letters written to debentureholders prior to the maturity date of the relevant deposit which stated that, unless the debentureholder indicated to the contrary, Banksia would automatically roll over the relevant deposit when it matured, on the basis of the then current Product Disclosure Statement.

Copies of examples of these documents are in the possession of the plaintiff's solicitor and may be inspected by prior appointment.

## **E1. 2009 BANKSIA PROSPECTUS: CONTRAVENTIONS OF SECTIONS 728 AND 1041E CORPORATIONS ACT**

19. On 6 October 2009, Banksia published Prospectus 16 pursuant to Chapters 6CA and 6D of the Corporations Act.

20. In Prospectus 16, the following statements were made:

- (a) Page 2: *“About the Banksia Financial Group*

*The Company predominantly invests funds in registered mortgages over real estate throughout Australia and more particularly mortgage loans managed by Banksia Mortgages Limited (BML), a member Company of Banksia. The remaining funds are invested in Australian banks and other investments as permitted under the Trust Deed....*

- (b) *We expect the company should continue to demonstrate a high ability and efficiency in managing and servicing its asset portfolio The ‘Stable’ outlook on Banksia’s servicer ranking reflects our expectation that the company will continue to operate in an effectively controlled and stable servicing environment. The company’s operations are managed by an industry-experienced management team, with clearly defined business strategies that respond to current market conditions. Banksia’s management expects to continue to focus on meeting high-quality loan-*

*servicing standards by implementing conservative lending policies and prudent underwriting standards.*

- (c) Page 4: ***"BENCHMARK 2 – Liquidity***

***Statement by the Company:***

*"The relativity of maturing investments and loans is a daily risk management exercise. Projections are made out to 24 months into the future to monitor the liquidity position based on maturing loans. Because investments and loans mature at different times the asset and liability mismatch is the focus of careful analysis and management."*

- (d) Page 6: *"As at 30 June 2009 the Company has 21 mortgage investments totalling \$12,686,143 where arrears of interest payments are more than 90 days overdue. Recovery proceedings have commenced. This represents 3.2% of the total debenture holder funds in the Company. Where appropriate, the Company has made loans non-interest accruing.*
- (e) *The Company has made provision for bad and doubtful debts of \$1,947,000 in the event of non-recovery of the full amount of an investment.*
- (f) *The Company also has Net Tangible Assets exceeding \$20.6 million, as at 30 June 2009....*
- (g) Page 8: ***"4.3 Risk Management***

*Market risk is managed via daily monitoring of the Company's asset/liability position and through continuous monitoring of changes in general economic and market conditions. Credit risk is managed through BML's loan assessment and management procedures (see Section 7.2).*

*The Company operates in accordance with Banksia's comprehensive risk management program, which is based on the standards set in AS/NZS 4360 and is central to Banksia's policy of continuous improvement.*

*Ongoing review of all identified risks to the operations of the group as a whole is maintained by select committees appointed from responsible personnel to develop and apply risk management covering:*

- *Finance and security;*
- *Legal and regulatory requirements;*
- *Comprehensive insurance;*
- *Market and economic conditions;*

*In managing risk to investors, Banksia operates in accordance with practices and procedures which include:*

- *appropriate due diligence during the loan assessment and credit approval process;*
- *a Compliance Plan;*
- *a Compliance Committee comprising a majority of external members;*
- *Statutory external audits;*

- a Board Credit Committee;
- a Board Audit & Corporate Governance Committee.

*The program requires regular meetings of all committees at which sources of risk are identified and managed. The action which results flows to policy and procedure adjustments throughout Banksia's operations. The Managing Director is involved in all facets of the program and reports to the Board twice yearly on the operation and detail of the risk management program."*

- (h) Pages 13-14:

***Loan Management:***

*BML has a professional and experienced team administering its mortgage loans.*

*BML operates a dedicated default management department. A Default Management Committee comprised of senior personnel meets weekly to review arrears. Discretion is applied in deciding the action to be taken and the timetable to apply to a default situation.*

- (i) Page 20: "**Balance Sheet as at 30 June 2009:**

*"NET ASSETS           \$20,612,939."*

- (j) Page 25: "**Independent Accountant's Report**"

*"... The audit reports for the financial years ended 30 June 2008 and 30 June 2009 were unqualified.*

*2) In our opinion, there have been no material items, transactions or events subsequent to the balance date which relate to conditions existing at the balance date and which require comment on, or adjustment to, the figures dealt with in our report. To the best of our knowledge and belief, there have been no material items, transactions or events subsequent to the balance date which, although they do not relate to the conditions existing at balance date, would cause reliance on the figures shown in this report to be misleading...*

*RICHMOND SINNOTT & DELAHUNTY*

*Chartered Accountants."*

- (k) Page 26: "**Directors' Report**

*"The Directors report that for the period 30 June 2009 to the date of this prospectus they have not become aware of any other circumstances which have or will materially affect the trading and profitability of the Company.*

*The Directors are of the view that having regard to the Company's past performance and current market activities, the Company will continue to trade successfully in the coming year.*

*The Directors of the Company are of the opinion that the Company will be in a position to meet, as they fall due, interest and principal payments on investments accepted under this prospectus."*

**(the 2009 Banksia Prospectus statements)**

21. As at 6 October 2009 (the date on which Prospectus 16 was published) in respect of its total loan assets of \$323,265,517, Banksia had made a provision of only \$1,947,000 (0.6%) for bad and doubtful debts, in circumstances where:
- (a) Banksia's audited accounts stated that, as at 30 June 2009:
    - (i) Banksia had total mortgage investment loan assets that were "*past due*" (being loans that were in arrears and with legal action in progress or classified as non-performing) of \$22,697,121;
    - (ii) of the total amount of past due loans, Banksia classified \$4,980,793 as "*Past due and impaired*";
    - (iii) of the total amount of past due loans, Banksia classified \$17,716,328 as "*Past due and not impaired*", of which \$6,501,795 of loans were over 90 days overdue;
    - (iv) Banksia had loans owing to it of \$6.9 million in respect of which possession had been taken of the underlying security; and
    - (v) Banksia's net equity (shareholders' funds) was only \$20,612,939, being less than 5% of its total assets and less than the value of its past due loans;
  - (b) as at 31 August 2009, \$168.2 million worth of debentures issued by Statewide were due to mature on or before 31 August 2010, of which 75%-80% were expected to be rolled over into debentures issued by Banksia, and at that time:
    - (i) Statewide's total loan portfolio was valued at \$191,645,975 (a substantial number and amount of Statewide loans having been transferred to Banksia before 31 August 2009);
    - (ii) but included within that Statewide loan portfolio were loans that were either subject to "*legal action*" or classified as "*Non-Performing*" valued

at \$65,553,379, comprising 34.2% of the total Statewide loan portfolio;  
and

- (iii) accordingly there was a substantial shortfall between the value of Statewide's loan assets and its debenture liabilities;
- (c) on 31 August 2009, Godfrey reported to the Directors that by reason of the Statewide Acquisition and having regard to the shortfall between the value of Statewide's assets and its liabilities, by 31 August 2010, \$53.2 million of existing Statewide debenture liabilities would be required to be funded by new deposit monies that had to be raised by Banksia;
- (d) the Banksia Risk Management program consisted only of the provision by a so-called "*Compliance Committee*" of quarterly reports and the provision by Godfrey of half-yearly reports to the Directors that:
  - (i) comprised substantially the reproduction of the same pro-forma document produced by the Compliance Committee or Godfrey, every quarter or half-year respectively;
  - (ii) contained no detailed analysis of or reference to the actual value of the Banksia loan portfolio at any time;
  - (iii) contained no detailed analysis of or reference to the actual value of the Statewide loan portfolio at any time;
  - (iv) contained no analysis of or reference to the deleterious financial effect on Banksia of the progressive transfer to Banksia of all of Statewide's loan assets and debenture liabilities;
  - (v) contained no analysis of or reference to the true value of loans in arrears, or the subject of legal action or non-performing in either the Banksia loan portfolio or the Statewide loan portfolio;
  - (vi) contained no analysis of or reference to the true level of impairment or the true value of Banksia's bad and doubtful debts or the question

whether the provision for bad and doubtful debts in Banksia's accounts was correct or adequate;

- (vii) contained no analysis of the risk that Banksia might be unable to pay its debts as and when they fell due and therefore might be or become insolvent because of the matters described above.

(referred to collectively as **the 2009 Banksia Financial Matters**)

### Particulars

With respect to item (a), the plaintiff refers to the audited accounts of Banksia for the year ended 30 June 2009, referred to and summarised in Prospectus 16.

For item (b), the plaintiff refers to the document entitled "*Loans with Legal Action in Progress – Banksia Mortgages Limited*" dated 31 August 2009; V11.020.

For item (c), the plaintiff refers to the Managing Director's Report prepared by Godfrey for the Board Meeting in August 2009; V8.141 - 146.

For item (d), the plaintiff refers to the Compliance Committee reports of Banksia: V3.448, V3.456 and V3.460.

All of the documents referred to in these particulars are in the possession of the plaintiff's solicitor and may be inspected by prior appointment.

Further particulars may be given after discovery has been given by the defendants.

22. Each of the 2009 Banksia Prospectus statements was a misleading or deceptive statement in a disclosure document in breach of sections 728 and 1041E of the Corporations Act by reason of the following matters:
  - (a) contrary to the statement contained in paragraph 20(a), Banksia did not "*predominantly invest funds in registered mortgages over real estate throughout Australia or more particularly mortgage loans managed by BML*" and nor were its "*remaining funds invested in Australian banks and other investments as permitted under the [Banksia] Trust Deed*", because in truth and in fact:
    - (i) as at the date of Prospectus 16, nearly 30% of Banksia's investments were contained in the Statewide loan portfolio, as a result of the Statewide Acquisition. That portfolio did not consist of "*mortgage loans managed by BML*";

- (ii) Banksia had lent \$9,500,000 of its debentureholders' funds to Securities HoldCo, its parent company, without any security whatsoever and that \$9,500,000 would ultimately be lost entirely because Securities Holdco would become insolvent; and
  - (iii) as a result of the BMF underwriting arrangement, Banksia was also investing its debentureholders' funds in the effective underwriting of all of the impaired loans contained in the BMF loan portfolio;
- (b) contrary to the statement contained in paragraph 20(b), in light of the Banksia undisclosed matters and the 2009 Banksia Financial Matters and the threats that those matters (together and individually) posed to the solvency and viability of Banksia:
- (i) Banksia did not have and would not continue to demonstrate “*a high ability and efficiency in managing and servicing its asset portfolio*”;
  - (ii) Banksia did not operate and would not “*continue to operate in an effectively controlled and stable servicing environment*”;
  - (iii) Banksia's operations were not managed by “*an industry-experienced management team*”;
  - (iv) Banksia's business strategies were not “*clearly defined*” anywhere and they did not “*respond to current market conditions*”;
  - (v) Banksia's management did not “*focus*” and was not going to “*continue to focus on meeting high-quality loan-servicing standards by implementing conservative lending policies or prudent underwriting standards*”; and
  - (vi) Insofar as the statement contained in paragraph 20(b) above implied that there existed reasonable grounds for stating those matters, no such reasonable grounds then existed;

- (c) contrary to the statement contained in paragraph 20(c), the “*relativity of maturing investments and loans*”, and “*the asset and liability mismatch*”, were not “*the focus of careful analysis and management*” by Banksia;
- (d) contrary to the statement contained in paragraph 20(d), Banksia did not have only “*21 mortgage investments totalling \$12,686,143 where arrears of interest payments are more than 90 days overdue*”, representing “*3.2% of total debenture holder funds*”. In truth and in fact:
  - (i) the Banksia loan portfolio as at that date comprised past due loans valued at \$45,521,097, representing 8.76% of Banksia’s loan portfolio (V11.030);
  - (ii) the Statewide loan portfolio as at that date comprised past due loans valued at \$65,931,860, comprising 41.63% of the total Statewide loan portfolio (V11.030);
  - (iii) the consolidated position showed past due loans of \$111,452,957 representing 16.43% of all loans (V11.030);
  - (iv) Securities Holdco had purported to acquire \$5 million of the \$9.2 million loan which Banksia had originally made to One Spencer Street Pty Ltd, so as to disguise the amount of impairment which Banksia would need to disclose in respect of that loan (being a total impairment of only \$500,000 recorded in the Group Accounts as at 30 June 2009, of which Securities Holdco recorded \$271,739 and Banksia recorded \$146,739 of provisions on a total non-performing debt due from One Spencer Street Pty Ltd, which at that time amounted to \$9.6 million);
- (e) contrary to the implicit representation made in the statement contained in paragraph 20(e) that the provision for bad and doubtful debts was adequate, in light of the Banksia undisclosed matters and the 2009 Banksia Financial Matters the provision for bad and doubtful debts of \$1,947,000 as at the date of Prospectus 16 was grossly inadequate;

- (f) contrary to the statement contained in paragraph 20(f), in light of the Banksia undisclosed matters and the 2009 Banksia Financial Matters and the matters alleged to in paragraphs 22(a)-(e) above, Banksia did not have net tangible assets exceeding \$20.6 million as at 30 June 2009 (**the 2009 Net Tangible Asset Error**);
- (g) contrary to the statement contained in paragraph 20(g), in light of the Banksia undisclosed matters, the 2009 Banksia Financial Matters and the matters alleged in paragraphs 22(a)-(f) above, in truth and in fact:
- (i) Banksia was not “*continuously monitoring changes in general economic and market conditions*”;
  - (ii) Banksia did not “*operate in accordance with a comprehensive risk management program, which was central to Banksia’s policy of continuous improvement*”;
  - (iii) there was no “*ongoing review of all identified risks to the operations of the Banksia Financial Group*”;
  - (iv) Banksia did not operate “*in accordance with practices and procedures that included appropriate due diligence during the loan assessment and credit approval process*”;
  - (v) Banksia’s risk management program did not involve “*regular meetings of all committees at which all sources of risk were identified and managed*”;
  - (vi) the action which resulted from Banksia’s so-called “*risk management program*” did not “*flow to policy and procedure adjustments throughout Banksia’s operations*”;
- (h) contrary to the statement contained in paragraph 20(h), in light of the BMF underwriting arrangement, the 2009 Banksia Financial Matters and the fact that Godfrey made all decisions about provisioning within Banksia and without

regard to Australian Accounting Standards or any external advice, in truth and in fact, “*discretion*” was not “*applied in deciding the action to be taken and the timetable to apply to a default situation*”;

- (i) contrary to the statement contained in paragraph 20(i), by reason of the 2009 Net Tangible Asset Error, Banksia did not have net assets of \$20,612,939;
- (j) contrary to the statement contained in paragraph 20(j), by reason of the existence of each of the Banksia undisclosed matters, the 2009 Banksia Financial Matters, the Statewide Acquisition and the matters alleged in paragraphs 22(a)-(i) above:
  - (i) there did exist “*material items, transactions or events subsequent to*” 30 June 2009 “*which require comment on, or adjustment to, the figures dealt with*” in the RSD “*report*”; and
  - (ii) the accounts published in Prospectus 16 were wholly unreliable;
- (k) contrary to the statement contained in paragraph 20(k), in light of the Banksia undisclosed matters, the 2009 Banksia Financial Matters, the Statewide Acquisition and each of the matters alleged in paragraph 22(a)-(j) above:
  - (i) the Directors were aware of circumstances which had or “*would materially affect the trading and profitability*” of Banksia;
  - (ii) the Directors had no reasonable basis to form or to state the unqualified opinion that Banksia “*would continue to trade successfully in the coming year*”;
  - (iii) the Directors had no reasonable basis to form or to state the unqualified opinion that Banksia would remain “*in a position to meet, as they fell due, interest and principal payments on investments accepted under*” Prospectus 16.

23. Further, none of the Banksia undisclosed matters or the 2009 Banksia Financial Matters or any of the matters alleged in paragraph 22 above was disclosed in Prospectus 16 and by reason of each item of non-disclosure, Prospectus 16 did not disclose all the

information that investors and their professional advisers would reasonably require to make an informed assessment in relation to Banksia's:

- (a) assets and liabilities;
- (b) financial position;
- (c) financial performance;
- (d) profits and losses; and
- (e) prospects,

in breach of sections 710 and 728 of the Corporations Act.

24. Each of the statements in sub-paragraphs 20(b), (c), (g), (h) and (k) above was a statement about a future matter within the meaning of s 728(2) of the Corporations Act and accordingly Banksia is taken to have made a misleading statement about each of those matters because it did not have reasonable grounds for making any of those statements as a result of the matters which are alleged in paragraph 22 above.
25. By reason of the matters alleged in paragraphs 6 to 24 inclusive above, in publishing Prospectus 16, Banksia contravened sections 728 and 1041E of the Corporations Act, in that it offered securities under a disclosure document that was likely to induce persons to apply for financial products (namely debentures) where the disclosure document:
- (a) contained misleading or deceptive statements (namely each of the statements alleged in paragraph 20 above); and/or
  - (b) omitted material matters that were required to be disclosed to investors by section 710 of the Corporations Act, namely:
    - (i) the Banksia undisclosed matters; and
    - (ii) the 2009 Banksia Financial Matters.

- (c) when Banksia ought reasonably to have known that the statements alleged in paragraph 20 above were false in a material particular or materially misleading by reason of the matters alleged in paragraphs 6-24 inclusive above.

**(the 2009 Banksia Prospectus Contraventions)**

**Causation and loss in respect of the 2009 Banksia Prospectus Contraventions**

- 26. Following the publication of Prospectus 16, Banksia Group Members:
  - (a) purchased Banksia debentures; and
  - (b) rolled over their existing Banksia debentures when they matured; and
  - (c) did not withdraw or seek to withdraw their investments in Banksia debentures.

**Particulars**

Bolitho rolled over his Banksia debentures following the publication of Prospectus 16 in the manner particularised in paragraph 1 above.

- 27. If the 2009 Banksia Prospectus Contraventions had not occurred, but instead the Banksia undisclosed matters, the 2009 Banksia Financial Matters and the matters alleged in paragraph 22 above had been disclosed in the 2009 Banksia Prospectus, Banksia's poor financial position and its poor financial prospects following the Statewide Acquisition would have been publicly revealed in October 2009 and one or more of the things enumerated in sub-paragraphs (a) to (e) below would then have occurred:
  - (a) Bolitho and many of the Banksia Group Members would have quickly learned about Banksia's poor financial position and its poor financial prospects following the Statewide Acquisition and would have taken steps to withdraw their investments from Banksia immediately. Those of the Banksia Group Members who invested after 2009 would not have invested at all in Banksia and would have suffered no loss;

### **Particulars**

Bolitho and most of the Banksia Group Members live and have at all material times lived in country towns in rural Victoria where Banksia was a large local business with a substantial presence. News (including any substantial rumour) of any threat to Banksia's long-term viability (such as those posed by the Banksia undisclosed matters and the 2009 Banksia Financial Matters) would have quickly come to the attention of Bolitho and most Banksia Group Members because of:

- (i) the profile and importance of Banksia in the rural towns in Victoria where it had its principal operations; and
- (ii) the number and value of the investments which Bolitho and most Banksia Group Members had made in Banksia debentures.

That news would have caused Bolitho and the Banksia Group Members to take steps to withdraw their investments from Banksia and not to invest any further money in Banksia.

- (b) Banksia would have disclosed breaches, alternatively impending breaches, of the Banksia AFSL Solvency and Liquidity Requirements particularised in paragraph 3(f) above;
- (c) Banksia would have been obliged to notify ASIC of the breaches of the Banksia AFSL Solvency and Liquidity Requirements;

### **Particulars**

Banksia had an obligation to disclose such breaches pursuant to s.912D(1B) of the Corporations Act.

- (d) Banksia would have been obliged to notify Trust Co (which would in turn have been obliged to notify ASIC) of the breaches of the Banksia AFSL Solvency and Liquidity Requirements;

### **Particulars**

Banksia had an obligation to notify Trust Co under clause 6.08(j) of the Banksia Trust Deed. Trust Co had an obligation to notify ASIC under s.283DA(e) of the Corporations Act.

- (e) had Banksia or Trust Co notified ASIC of Banksia's breaches of the Banksia AFSL Solvency and Liquidity Requirements, the Banksia AFSL would have been suspended or cancelled by ASIC, further or alternatively Trust Co or ASIC would have applied to the Court for orders under s.283HB(1) of the Corporations Act.;

### Particulars

It is reasonable to infer that, had the circumstances identified in the previous sub-paragraphs of this paragraph occurred, ASIC would have taken immediate steps to suspend or cancel Banksia's AFSL under s.915B(3) of the Corporations Act, further or alternatively Trust Co or ASIC would have applied to the Court under s.283HB(1) of the Corporations Act.

- (ea) Trust Co would have refused to consent to being named in, or to the publication of, Prospectus 16 with the consequence that Prospectus 16 would not have been issued and Banksia would have ceased trading.

If one or more of the events described in sub-paragraphs (a) to (ea) above had occurred, then, within a few weeks thereafter:

- (f) Banksia would have ceased to accept further deposits or to issue or roll over debentures and its business would have ceased; and
- (g) steps would have been taken by one or more of the defendants, Banksia debentureholders or ASIC (for example, following application to the Court by ASIC or Trust Co under s.283HB(1) of the Corporations Act) to prevent any further harm coming to Banksia and the Banksia debentureholders from the matters alleged in the following paragraphs of this statement of claim:
  - (i) paragraphs 10(c) and (d) (namely the progressive rollover into Banksia debentures and the payment out of Statewide debentureholders at 100 cents in the dollar, when in fact Statewide was insolvent at the time of the Statewide Acquisition, and accordingly Statewide debentures were worth much less than 100 cents in the dollar. The total amount of Statewide debenture rollovers exceeded \$238M and the total amount of Statewide debenture payments out by Banksia exceeded \$100M (see V4.388). Each such rollover and payment of 100 cents in each dollar of Statewide debentures by Banksia constituted a transfer to the Statewide debentureholders of Banksia's assets which ought to have been available – and would otherwise have been available - to pay Banksia debentureholders in full);

- (ii) paragraphs 11,12 and 13 (namely the progressive transfer of impaired Statewide loans to Banksia at inflated book values and in breach of the 70% LVR in the Banksia Trust Deed, which had the effect of progressively devaluing the Banksia loan book during the time that the transfers took place (2009-2011) and thereafter because the value of the loans in the Statewide loan book continued progressively to deteriorate following the Statewide Acquisition in March 2009, as disclosed by the documents which appear at V1.064, V1.065, V1.066, V1.067, V1.364, V1.393, V1.415, V1.445, V2.001, V2.032, V2.053, V2.139, V2.203, and V11.016-V11.048);
- (iii) paragraphs 15 and 16 (the purported underwriting of BMF loans using Banksia debentureholders' funds, which constituted a preference given by Banksia to unitholders in BMF at the expense of Banksia's debentureholders and a misuse of Banksia's property which ought to have been preserved in order to pay Banksia's debentureholders in full);
- (h) if the steps described in sub-paragraph (g) above had been taken, because the matters alleged in paragraphs 10-16 above were both unlawful (because they constituted breaches of the Banksia Trust Deed as alleged in paragraphs 59(a), 59(c) and 59(e) below) and harmful to Banksia and its debentureholders, they would have been stopped immediately or very shortly after they were publicly disclosed, for example by the appointment of external administrators to Banksia, or by other judicial proceedings commenced by ASIC or Trust Co (for example under s.283HB(1) of the Corporations Act), or by the Banksia debentureholders;
- (i) had one or more of the events described in sub-paragraphs (f)-(h) above occurred in 2009, it is likely that Bolitho and the Banksia Group Members would have suffered no loss at all because Banksia was solvent in 2009 prior to and for some time following the Statewide Acquisition;

### **Particulars**

Expert reports of Potter and Morris.

- (j) because the matters alleged in paragraphs 10(c) and (d), 11, 12, 13, 15 and 16 above did not cease until after the appointment of receivers and managers to Banksia in October 2012, Bolitho and the Banksia Group Members suffered a substantial and progressive decrease in the value of Banksia's assets, and a substantial and progressive increase in the value of Banksia's liabilities as a result of the adverse effect of those matters continuing from March 2009 until October 2012;
- (k) had the matters alleged in paragraphs 10(c) and (d), 11, 12, 13, 15 and 16 above been stopped earlier, Bolitho and the Banksia Group Members would have suffered no loss (if the matters had been stopped in 2009), alternatively less loss than they have in fact suffered as a result of those matters being allowed to adversely affect the value of Banksia for 3 years and 7 months until October 2012.

28. By reason of the 2009 Banksia Prospectus Contraventions, Bolitho and some Banksia Group Members (being those who were adversely affected by the 2009 Banksia Prospectus Contraventions in the manner alleged in paragraph 27 above):

- (a) suffered loss and damage;

#### **Particulars**

The loss is the unpaid principal in respect of the Banksia debentures since 25 October 2012. Interest will be sought pursuant to the Supreme Court Act 1986 (Vic).

- (b) are entitled, pursuant to sections 729 and 1041I of the Corporations Act, to recover the loss or damage suffered by them from Banksia.

#### **Particulars**

Banksia published Prospectus 16.

## **E2. 2010 BANKSIA PROSPECTUS: CONTRAVENTIONS OF SECTIONS 728 AND 1041E**

29. As at June 2010:

- (a) clause 8.01 of the Banksia Trust Deed required that Banksia not at any time issue any further debentures if Banksia's 'Total External Liabilities' (as defined) would thereupon equal or exceed ninety-seven (97%) of Banksia's 'Total Tangible Assets' (as defined) (**Banksia's Margin**);
- (b) Banksia's Margin was very close to the 97% limit in clause 8.01.

**Particulars**

T 430.5 – 16; 1218.17- 1219.2.

30. Despite the fact that clause 8.02(b) of the Banksia Trust Deed expressly required Banksia to exclude the amount of Banksia's provisions for bad and doubtful debts from Total Tangible Assets in calculating Banksia's Margin, Banksia added back its provisions for bad and doubtful debts as assets in making the calculation of Banksia's Margin after 30 June 2010.

**Particulars**

T 746.30 – 747.23; 889.16 – 24; 968.8 – 13; 1181.13 – 1183.11; 1224.29 – 1225.4. The plaintiff also refers to the emails on 24 August 2010 at V11.85 - 90 whereby Wes Santilla initially asked Trust Co if Banksia could add back its bad debt provisions in the clause 8.02 calculation, Silavecky of Trust Co had replied that Banksia could not and nevertheless Santilla told Paul Brown of RSD that Trust Co had said it was ok to add back the provisions, to which Brown of RSD agreed.

31. Banksia's valuations of security property were not undertaken as at the current date, but at some unspecified point in the future, which was in breach of Australian Accounting Standard AASB 139, which applied to Banksia by reason of s.296 of the Corporations Act.

**Particulars**

T 1212.25 – 30.

(The matters referred to in paragraphs 29 to 31 are hereafter referred to as **the 2010 Banksia Accounting Changes**).

32. On 15 October 2010, Banksia published Prospectus 17 pursuant to Chapters 6CA and 6D of the Corporations Act.

33. In Prospectus 17, the following statements were made:

(a) Introductory page:

*“Synopsis.... The surplus of assets over liabilities of the Company as at 30 June 2010 was \$23.70 million... The Company has a provision for impairment as at 30 June 2010 amounting to \$3.84 million for the purposes of any bad debts incurred.*

(b) Page 2: *“The Company predominantly invests funds in registered mortgages over real estate and more particularly mortgage loans managed by Banksia Mortgages Limited (BML), a member Company of Banksia. The remaining funds are invested in Australian banks and other investments as permitted under the Trust Deed.”*

(c) Page 4: *The relativity of maturing investments and loans is a daily risk management exercise. Projections are made out to 24 months into the future to monitor the liquidity position based on maturing loans. Because investments and loans mature at different times the asset and liability mismatch is the focus of careful analysis and management.”*

(d) Page 7: *“As at 30 June 2010 the Company has 62 mortgage investments totalling \$96,942,419 where arrears of interest payments are more than 30 days overdue. Where appropriate, the Company has made mortgage investments and loans non-interest accruing. In all cases the Company holds security for the investment...”*

*The Company has made provision for bad and doubtful debts of \$3,845,000 in the event of non-recovery of the full amount of an investment. The Company also has Net Tangible Assets exceeding \$23.7 million, as at 30 June 2010....”*

(e) Page 10: **“4.3 Risk Management.** *Market risk is managed via daily monitoring of the Company’s asset/liability position and through continuous monitoring of changes in general economic and market conditions. Credit risk is managed through BML’s loan assessment and management procedures (see Section 7.2).*

*The Company operates in accordance with Banksia’s comprehensive risk management program, which is based on the standards set in AS/NZS ISO 31000-2009 and is central to Banksia’s policy of continuous improvement. Ongoing review of all identified risks to the operations of the group as a whole is maintained by select committees appointed from responsible personnel to develop and apply risk management covering: finance and security, legal and regulatory requirements, comprehensive insurances, market and economic*



*The Directors are of the view that having regard to the Company's past performance and current market activities, the Company will continue to trade successfully in the coming year.*

*The Directors of the Company are of the opinion that the Company will be in a position to meet, as they fall due, interest and principal payments on investments accepted under this prospectus. The ability of the Company to meet its commitments depends on the quality of its secured mortgage loans and the management of its liquid reserves...."*

34. As at 15 October 2010 (the date on which Prospectus 17 was published), in respect of its total loan assets of \$459,132,098, Banksia had made a provision of only \$3,845,000 for bad and doubtful debts, in circumstances where:

- (a) Banksia's audited accounts stated that, as at 30 June 2010:
  - (i) Banksia had total mortgage loan assets that were "*past due*" (being loans that were in arrears and with legal action in progress or classified as non-performing) of \$73,877,957;
  - (ii) of the total amount of past due loans, Banksia classified \$29,987,291 as "*Past due and impaired*";
  - (iii) of the total amount of past due loans, Banksia classified \$43,890,666 as "*Past due and not impaired*", of which \$30,897,215 of loans were over 90 days overdue;
  - (iv) Banksia had loans owing to it of \$40.9 million in respect of which possession had been taken of the underlying security; and
  - (v) Banksia's net equity (shareholders' funds) was only \$23,706,376, being less than 4% of its total assets and less than the value of its past due loans;
- (b) Banksia published on its website in 2010 a "*Continuous Disclosure Update*" (CDU) on a number of occasions, which included the following (**the CDU website disclosures**):

- (i) CDU number 1 was published on 3 March 2010, referring to data as at 31 January 2010. It stated that there had been an increase in the number of Banksia's loans in arrears from 21 (as at 30 June 2009) to 31 (as at 31 January 2010), and that the total amount of loans in arrears had grown in the same period from \$12.6M to \$45.6M, representing 8.3% of total debentureholders' funds in Banksia. The increase was attributed to "*the economic climate and the increase of loans transferring from SSI to [Banksia] as a result of the amalgamation of SSI with [Banksia]*";
- (ii) CDU number 2 was published on 28 April 2010, referring to data as at 31 March 2010. It stated that the number of Banksia loans in arrears had decreased to 28 but the value had increased to \$63.34M, representing 11.26% of total debentureholders' funds in Banksia. Once again, the increase in arrears was attributed to "*the economic climate and the increase of loans transferring from SSI to [Banksia] as a result of the amalgamation of SSI with [Banksia]*";
- (iii) CDU number 3 was published on 23 June 2010 referring to data as at 31 May 2010. It stated that the number of loans in arrears had increased to 37 and the value in arrears had increased to \$76.95M, representing 13.15% of total debentureholders' funds. Once again, the increase was attributed to "*the economic climate and the increase of loans transferring from SSI to [Banksia] as a result of the amalgamation of SSI with [Banksia]*";
- (iv) CDU number 4 was published on 5 July 2010, referring to data as at 30 June 2010. This time the CDU was in a different form, namely:
  - (A) It did not refer to the previously reported numbers, values or percentages of the loan arrears. In fact, as at 30 June 2010 there were 54 overdue loans valued at \$106.7 million and representing 16.86% of total debentureholders' funds (as per document entitled "Loan arrears – 60 days and over" for BML dated 30 June 2010).

- (B) it stated that: “*in addition to matching the transfer of loans to the crossover of Statewide investments, every effort has been made to give consideration to the realizable value of securities by providing for any applicable provision for impairment. The process adopted is designed to enable a transition of all loans from Statewide to Banksia, notwithstanding that these loans do not go through the normal loan approval process applied to a typical Banksia approved investment given that they were part of the Statewide mortgage book. Banksia continues to fulfill all of its reporting obligations pursuant to the Trust Deed and Corporations Act 2010 requirements.*”;
- (C) it also stated that “*substantial growth in loans and investments in [Banksia] has occurred in the financial year ended 30 June 2010 as a consequence of [Banksia’s] amalgamations [sic] with Statewide Secured Investments Limited.*”
- (v) CDU number 5 was published on 5 August 2010, referring to data as at 30 June 2010. Once again, the CDU was in a different form, namely:
- (A) it did not refer to the previously reported numbers, values or percentages of the loan arrears;
- (B) it stated that whereas Banksia’s 2009 prospectus had stated a provision for the impairment of receivables, loans and advances of \$1.947M, as at 30 June 2010 Banksia had increased the provision for impairment to \$3.845M;
- (C) the increase was said to be “*in recognition of the economic climate and the increase of loans transferring from Statewide Secured Investments Ltd to [Banksia] as a result of the amalgamation of SSI with the Company Group*”.
- (vi) CDU number 6 was published on 30 August 2010, referring to date as at 31 July 2010. Once again, the CDU was in a different form, namely:

- (A) it did not refer to the previously reported numbers, values or percentages of the loan arrears;
  - (B) it referred only to the loan from Banksia to Securities Holdco Ltd, and stated that that loan had increased from \$9,500,000 as at 30 June 2009 to \$10,990,000 as at 26 August 2010;
- (c) following the Statewide Acquisition on 30 March 2009, the loan assets and debenture liabilities of Statewide continued to be transferred (in the case of the loan assets) or rolled over (in the case of the debentures) to Banksia and as at 30 June 2010, the remaining Statewide loan portfolio that was still to be transferred into Banksia (i.e. that was not recorded in Banksia's accounts):
- (i) comprised a loan portfolio valued at \$54,262,805;
  - (ii) included within that Statewide portfolio were loans valued at \$41,091,417 which were "*in Legal Action*", representing 75.7% of the Statewide loan portfolio;
- (d) at 31 August 2010, the consolidated position for the Banksia Mortgages Limited group was that of a total loan portfolio valued at \$644,427,617, the total loans in "*legal action*" were valued at \$117,806,271, comprising 18.28% of the total loan portfolio;
- (e) the Banksia Risk Management program consisted only of the provision by a so-called "*Compliance Committee*" of quarterly reports and the provision by Godfrey of half-yearly reports, to the board of directors of the Banksia Financial Group that:
- (i) comprised substantially the reproduction of the same pro-forma document produced by the Compliance Committee or Godfrey, every quarter or half-year respectively;
  - (ii) contained no analysis of or reference to the actual value of the Banksia loan portfolio at any time;

- (iii) contained no analysis of or reference to the actual value of the Statewide loan portfolio at any time;
  - (iv) contained no analysis of or reference to the deleterious financial effect on Banksia of the progressive transfer to Banksia of all of Statewide's loan assets and debenture liabilities;
  - (v) contained no analysis of or reference to the true value of loans in arrears or the subject of legal action or non-performing, in either the Banksia loan portfolio or the Statewide loan portfolio;
  - (vi) contained no analysis of or reference to the true level of impairment or the true value of Banksia's bad and doubtful debts or the question whether the provision for bad and doubtful debts in Banksia's accounts was correct or adequate;
  - (vii) contained no analysis of the risk that Banksia might be unable to pay its debts as and when they fell due and therefore might be or become insolvent because of the matters described above.
- (f) in September 2010, Godfrey, the Managing Director of the Banksia Financial Group, informed the shareholders of Banksia (but not its debentureholders) that:

*“The recovery of loans from defaulting borrowers is the single most demanding task the group continues to face. A significant amount of non performing debt is secured over construction/ development/ land subdivision type properties. A large number of developers have either failed or have suffered serious financial stress and accordingly buyer demand for these types of properties is greatly reduced. We have recognised the potential for losses on realization by increasing provisions for doubtful debts to \$10.5 million at 30 June 2010.”*

(referred to collectively as the **2010 Banksia Financial Matters**)

### **Particulars**

For item (a), the plaintiff refers to the audited accounts of Banksia for the year ended 30 June 2010, referred to and summarised in Prospectus 17.

For item (b), the plaintiff refers to the Continuous Disclosure Updates, numbered 1 - 6: V1.064 – 68; V1.101 – 102.

For items (c) and (d), the plaintiff refers to two Banksia documents entitled “*Loans with Legal Action in Progress*” dated 31 January 2010 and 31 August 2010 respectively.

For item (e), the plaintiff refers to the Compliance Committee Reports produced by Banksia: V3.448; V3.456 and V3.460.

For item (f), the plaintiff refers to the Shareholder Newsletter dated September 2010: V17.056.

All of the documents referred to in these particulars are in the possession of the plaintiff’s solicitor and may be inspected by prior appointment.

Further particulars may be given after discovery has been given by the defendants.

35. Each of the 2010 Banksia Prospectus statements was a misleading or deceptive statement in a disclosure document in breach of sections 728 and 1041E of the Corporations Act by reason of the following matters:
- (a) contrary to the statement contained in paragraph 33(a), in light of the Banksia undisclosed matters, the 2010 Banksia Financial Matters and the 2010 Banksia Accounting Changes:
    - (i) Banksia did not have net tangible assets of \$23.7 million as at 30 June 2010 (**the 2010 Net Tangible Asset Error**); and
    - (ii) Banksia’s provision for bad and doubtful debts of \$3,845,000 was grossly inadequate;
  - (b) contrary to the statement contained in paragraph 33(b), Banksia did not “*predominantly invest funds in registered mortgages over real estate throughout Australia or more particularly mortgage loans managed by BML*” and nor were its “*remaining funds invested in Australian banks and other investments as permitted under the [Banksia] Trust Deed*”, because in truth and in fact:
    - (i) as at the date of Prospectus 17, Banksia had investments contained in the Statewide loan portfolio, as a result of the Statewide Acquisition. That portfolio did not consist of “*mortgage loans managed by BML*”;

- (ii) Banksia had lent \$10,990,000 of its debentureholders' funds to Securities HoldCo, its parent company, without any security whatsoever and that \$10,990,000 would ultimately be lost entirely because Securities Holdco would become insolvent; and
  - (iii) as a result of the BMF underwriting arrangement, Banksia was also investing its debentureholders' funds in the effective underwriting of all of the impaired loans contained in the BMF loan portfolio;
- (c) contrary to the statement contained in paragraph 33(c), the "*relativity of maturing investments and loans*", and "*the asset and liability mismatch*", were not "*the focus of careful analysis and management*" by Banksia;
- (d) contrary to the statement contained in paragraph 33(d), as at 30 June 2010 Banksia did not have "*62 mortgage investments totalling \$96,942,419 where arrears of interest payments are more than 30 days overdue*". In truth and in fact:
- (i) Securities Holdco had purported to acquire \$5 million of the \$9.2 million loan which Banksia had originally made to One Spencer Street Pty Ltd, so as to disguise the amount of impairment which Banksia would need to disclose in respect of that loan (being a total impairment of only \$500,000 recorded in the Group Accounts as at 30 June 2009, of which Securities Holdco recorded \$271,739 and Banksia recorded \$146,739 of provisions on a total non-performing debt which at that time amounted to \$9.6 million);
  - (ii) further, contrary to the implicit representation made in the statement contained in paragraph 33(d) that the provision for bad debts was adequate, in light of the Banksia undisclosed matters, the 2010 Banksia Financial Matters and the 2010 Banksia Accounting Changes, the provision for bad and doubtful debts of \$3,845,000 was grossly inadequate;

- (e) contrary to the statement contained in paragraph 33(e), in light of the Banksia undisclosed matters, the 2010 Banksia Financial Matters, the 2010 Banksia Accounting Changes and the matters alleged to in paragraphs 33(a)-(d) above, in truth and in fact:
- (i) Banksia was not “*continuously monitoring changes in general economic and market conditions*”;
  - (ii) Banksia did not “*operate in accordance with a comprehensive risk management program, which was central to Banksia’s policy of continuous improvement*”;
  - (iii) there was no “*ongoing review of all identified risks to the operations of the Banksia Financial Group*”;
  - (iv) Banksia did not operate “*in accordance with practices and procedures that included appropriate due diligence during the loan assessment and credit approval process*”;
  - (v) Banksia’s risk management program did not involve “*regular meetings of all committees at which all sources of risk were identified and managed*”;
  - (vi) the action which resulted from Banksia’s so-called “*risk management program*” did not “*flow to policy and procedure adjustments throughout Banksia’s operations*”;
- (f) contrary to the statement contained in paragraph 33(f), in light of the BMF underwriting arrangement, the 2010 Banksia Financial Matters and the fact that Godfrey made all decisions about provisioning within Banksia and without regard to Australian Accounting Standards or any external advice, in truth and in fact, “*discretion*” was not “*applied in deciding the action to be taken and the timetable to apply to a default situation*”;

- (g) contrary to the statement contained in paragraph 33(g), by reason of the Net Tangible Asset Error, Banksia did not have net assets of \$23,706,376 as at 30 June 2010;
  - (h) contrary to the statement contained in paragraph 33(h), by reason of the existence of each of the Banksia undisclosed matters, the 2010 Banksia Financial Matters, the Statewide Acquisition, the 2010 Banksia Accounting Changes and the matters alleged in paragraphs 33(a)-(g) above:
    - (i) there did exist “*material items, transactions or events subsequent to*” 30 June 2010 “*and which require[d] comment on, or adjustment to, the figures dealt with*” in the RSD “*report*”; and
    - (ii) the accounts published in Prospectus 17 were unreliable;
  - (i) contrary to the statement contained in paragraph 33(i), in light of the Banksia undisclosed matters, the 2010 Banksia Financial Matters, the Statewide Acquisition, the 2010 Banksia Accounting Changes and each of the matters alleged in paragraphs 33(a)-(h) above:
    - (i) the Directors were aware of circumstances which had or “*would materially affect the trading and profitability*” of Banksia;
    - (ii) the Directors had no reasonable basis to form or to state the unqualified opinion that Banksia “*would continue to trade successfully in the coming year*”;
    - (iii) the Directors had no reasonable basis to form or to state the unqualified opinion that Banksia would remain “*in a position to meet, as they fell due, interest and principal payments on investments accepted under*” Prospectus 17.
36. Further, none of the Banksia undisclosed matters, the 2010 Banksia Financial Matters, the 2010 Banksia Accounting Changes or any of the matters alleged in paragraph 35 above, were disclosed in Prospectus 17 and by reason of each item of non-disclosure,

Prospectus 17 did not disclose all the information that investors and their professional advisers would reasonably require to make an informed assessment in relation to Banksia's:

- (a) assets and liabilities;
- (b) financial position;
- (c) financial performance;
- (d) profits and losses; and
- (e) prospects,

in breach of sections 710 and 728 of the Corporations Act.

37. Each of the statements in sub-paragraphs 33(c), (e), (f), (h) and (i) above was a statement about a future matter within the meaning of s 728(2) of the Corporations Act and accordingly Banksia is taken to have made a misleading statement about each of those matters because it did not have reasonable grounds for making any of those statements as a result of the matters which are alleged in paragraph 34 above.
38. By reason of the matters alleged in paragraphs 32-37 inclusive above, in publishing Prospectus 17, Banksia contravened sections 728 and 1041E of the Corporations Act, in that it offered securities under a disclosure document that was likely to induce persons to apply for financial products (namely debentures) where the disclosure document:
- (a) contained misleading or deceptive statements (namely each of the statements alleged in paragraph 33 above) ; and/or
  - (b) omitted material matters that were required to be disclosed to investors by section 710 of the Corporations Act, namely each of:
    - (i) the Banksia undisclosed matters;
    - (ii) the 2010 Banksia Financial Matters; and

- (iii) the 2010 Banksia Accounting Change.
- (c) when Banksia ought reasonably to have known that the statements alleged in paragraph 33 above were false in a material particular or materially misleading by reason of the matters alleged in paragraphs 34 - 37 inclusive above.

**(the 2010 Banksia Prospectus Contraventions)**

**Causation and loss in respect of the 2010 Banksia Prospectus Contraventions**

39. Following the publication of Prospectus 17, Banksia Group Members:
- (a) purchased Banksia debentures; and
  - (b) rolled over their existing Banksia debentures when they matured; and
  - (c) did not withdraw or seek to withdraw their investments in Banksia debentures.

**Particulars**

Bolitho rolled over his Banksia debentures following the publication of Prospectus 17 in the manner particularised in paragraph 1 above.

40. If the 2010 Banksia Prospectus Contraventions had not occurred, but instead the Banksia undisclosed matters, the 2010 Banksia Accounting Changes, the 2010 Banksia Financial Matters and the matters alleged in paragraph 35 above had been disclosed in the 2010 Banksia Prospectus, Banksia's poor financial position and its poor financial prospects following the Statewide Acquisition would have been publicly revealed in October 2010 and one or more of the events described in sub-paragraphs 27(a)-(h) above would then have occurred, with the consequence that Bolitho and the Banksia Group Members would have suffered less loss than they have in fact suffered as a result of the adverse effects alleged in sub-paragraphs 27(j) and (k) above continuing until October 2012. Those of the Banksia Group Members who invested after 2010 would not have invested at all in Banksia and would have suffered no loss.

41. By reason of the 2010 Banksia Prospectus Contraventions, Bolitho and some Banksia Group Members (being those who were adversely affected by the 2010 Banksia Prospectus Contraventions in the manner alleged in paragraph 40 above):
- (a) suffered loss and damage;

**Particulars**

The loss is the unpaid principal in respect of the Banksia debentures since 25 October 2012. Interest will be sought pursuant to the Supreme Court Act 1986 (Vic).

- (b) are entitled, pursuant to sections 729 and 1041I of the Corporations Act, to recover the loss or damage suffered by them from Banksia.

**Particulars**

Banksia published Prospectus 17.

**E3. 2011 BANKSIA PROSPECTUS: CONTRAVENTIONS OF SECTION 728**

42. On 17 October 2011, Banksia published Prospectus 18 pursuant to Chapters 6CA and 6D of the Corporations Act.
43. In Prospectus 18, the following statements were made:
- (a) Introductory page:

*“Synopsis.... The surplus of assets over liabilities of the Company as at 30 June 2011 was \$24.06 million. Profit after income tax expense of the Company was for the year ended 30 June 2011 was \$1.86 million.*

- (b) Page 2:

*The Company predominantly invests funds in registered mortgages over real estate throughout Australia and more particularly mortgage loans managed by Banksia Mortgages Limited (BML), a member Company of Banksia. The remaining funds are invested in Australian banks and other investments as permitted under the Trust Deed.*

- (c) Page 4: *“The relativity of maturing investments and loans is a daily risk management exercise. Projections are made out to 24 months into the future to monitor the liquidity position based on maturing loans. Because investments and loans mature at different times the asset and liability mismatch is the focus of careful analysis and management.”*
- (d) Page 7: *“As at 30 June 2011 the Company has 82 mortgage investments totalling \$110.9 million where arrears of interest payments are more than 30 days overdue. Where appropriate, the Company has made mortgage investments and loans non-interest accruing. In all cases the Company holds security for the investment...”*

*The Company has made provision for bad and doubtful debts of \$4,146,000 in the event of non-recovery of the full amount of an investment.*

*The Company also has net assets exceeding \$24.0 million, as at 30 June 2011.....”*

- (e) Page 12: **“4.3 Risk Management** *Market risk is managed via daily monitoring of the Company’s asset/liability position and through continuous monitoring of changes in general economic and market conditions. Credit risk is managed through BML’s loan assessment and management procedures (see Section 7.2). The Company operates in accordance with Banksia’s comprehensive risk management program, which is based on the standards set in AS/NZS ISO 31000-2009 and is central to Banksia’s policy of continuous improvement. Ongoing review of all identified risks to the operations of the group as a whole is maintained by select committees appointed from responsible personnel to develop and apply risk management covering: finance and security, legal and regulatory requirements, comprehensive insurance, market and economic conditions, technology, environment and hazards, including waste; and occupational health and safety. In managing risk to investors, Banksia operates in accordance with practices and procedures which include: appropriate due diligence during the loan assessment and credit approval process, a Compliance Plan, a Compliance Committee comprising a majority of external members, Statutory external audits, a Board Credit Committee, a Board Legal and Regulatory Committee; and a Board Audit & Corporate Governance Committee. The program requires regular meetings of all committees at which sources of risk are identified and managed. The action which results flows to policy and procedure adjustments throughout Banksia’s operations. The Managing Director is involved in all facets of the program and reports to the Board twice yearly on the operation and detail of the risk management program.*
- (f) Page 20: **Loan Management:** *BML has a professional and experienced team administering its mortgage loans.... Discretion is applied in deciding the action to be taken and the timetable to apply to a default situation.”*
- (g) Page 25: **“Statement of Financial Position as at 30 June 2011: “NET ASSETS \$24,061,249.”**

- (h) Page 29: **“Independent Accountant’s Report”** “... The audit reports for the financial years ended 30 June 2010 and 30 June 2011 were unqualified. 2) In our opinion, there have been no material items, transactions or events subsequent to the balance date which relate to conditions existing at the balance date and which require comment on, or adjustment to, the figures dealt with in our report. To the best of our knowledge and belief, there have been no material items, transactions or events subsequent to the balance date which, although they do not relate to the conditions existing at balance date, would cause reliance on the figures shown in this report to be misleading...”

**RICHMOND SINNOTT & DELAHUNTY**

*Chartered Accountants.”*

- (i) Page 30: **“Directors’ Report”** “The Directors report that for the period 30 June 2011 to the date of this prospectus they have not become aware of any other circumstances which have or will materially affect the trading and profitability of the Company. The Directors are of the view that having regard to the Company’s past performance and current market activities, the Company will continue to trade successfully in the coming year. The Directors of the Company are of the opinion that the Company will be in a position to meet, as they fall due, interest and principal payments of investments accepted under this prospectus. The ability of the Company to meet its commitments depends on the quality of its secured mortgage loans and the management of its liquid reserves....”

44. As at 17 October 2011 (the date on which Prospectus 18 was published), in respect of its total loan assets of \$505,453,754, Banksia had made a provision of only \$4,146,000 for bad and doubtful debts, in circumstances where:

- (a) Banksia’s audited accounts stated that, as at 30 June 2011:
- (i) Banksia had total mortgage investments loan assets that were “*past due*” (being loans that were in arrears and with legal action in progress or classified as non-performing) of \$123,936,355;
  - (ii) of the total amount of past due loans, Banksia classified \$28,523,251 as “*Past due and impaired*”;
  - (iii) of the total amount of past due loans, Banksia classified \$95,413,104 as “*Past due and not impaired*”, of which \$84,012,951 of loans were over 90 days overdue;

- (iv) Banksia had loans owing to it of \$80.6 million in respect of which possession had been taken of the underlying security; and
  - (v) Banksia's net equity (shareholders' funds) was only \$24,061,249, being less than 4% of its total assets and less than the value of its past due loans;
- (b) Banksia had absorbed the vast majority of the Statewide loan portfolio;
- (c) as at 31 January 2011, the consolidated position for the Banksia Group was that, of a total loan portfolio valued at \$650,757,633, the total loans in "*legal action*" were valued at \$142,781,706, comprising 21.94% of the total loan portfolio.
- (d) as at 31 August 2011, the consolidated position for the Banksia Group was that, of a total loan portfolio valued at \$620,120,612, the total loans in "*legal action*" were valued at \$130,379,951, comprising 21.02% of the total loan portfolio;
- (e) the Banksia Risk Management program consisted only of the provision by a so-called "*Compliance Committee*" of quarterly reports and the provision by Godfrey of half-yearly reports, to the board of directors of the Banksia Financial Group that:
- (i) comprised substantially of the reproduction of the same pro-forma document produced by the Compliance Committee or Godfrey, every quarter or half-year respectively;
  - (ii) contained no analysis of or reference to the actual value of the Banksia loan portfolio at any time;
  - (iii) contained no analysis of or reference to the actual value of the Statewide loan portfolio at any time;
  - (iv) contained no analysis of or reference to the deleterious financial effect on Banksia of the progressive transfer to Banksia of all of Statewide's loan assets and debenture liabilities;

- (v) contained no analysis of or reference to the true value of loans in arrears or the subject of legal action, or non-performing in either the Banksia loan portfolio or the Statewide loan portfolio;
- (vi) contained no analysis of or reference to the true level of impairment or the true value of Banksia's bad and doubtful debts or the question whether the provision for bad and doubtful debts in Banksia's accounts was correct or adequate;
- (vii) contained no analysis of the risk that Banksia might be unable to pay its debts as and when they fell due and therefore might be or become insolvent because of the matters described above.

(referred to collectively as the **2011 Banksia Financial Matters**)

#### **Particulars**

For item (a), the plaintiff refers to the audited accounts of Banksia for the year ended 30 June 2011, referred to and summarized in Prospectus 18.

For items (b)-(d), the plaintiff refers to two Banksia documents entitled "*Loans with Legal Action in Progress*" dated 31 January 2011 and 31 August 2011 respectively.

For item (e), the plaintiff refers to the Compliance Committee Reports of Banksia: V3.448, V3.456 and V3.

All of the documents referred to in these particulars are in the possession of the plaintiff's solicitor and may be inspected by prior appointment.

Further particulars may be given after discovery has been given by the defendants.

45. Each of the 2011 Banksia Prospectus statements was a misleading or deceptive statement in a disclosure document in breach of section 728 of the Corporations Act by reason of the following matters:
- (a) contrary to the statement contained in paragraph 43(a), in light of the Banksia undisclosed matters, the 2010 Banksia Financial Matters, the 2010 Banksia Accounting Changes and the 2011 Banksia Financial Matters:

- (i) Banksia did not have net tangible assets of \$24.06 million as at 30 June 2011 (**the 2011 Net Tangible Asset Error**);
  - (ii) the provision for bad and doubtful debts of \$4,146,000 was grossly inadequate;
- (b) contrary to the statement contained in paragraph 43(b), Banksia did not “*predominantly invest funds in registered mortgages over real estate throughout Australia or more particularly mortgage loans managed by BML*” and nor were its “*remaining funds invested in Australian banks and other investments as permitted under the [Banksia] Trust Deed*”, because in truth and in fact:
- (i) as at the date of Prospectus 18, Banksia had acquired nearly the whole of the Statewide loan portfolio as a result of the Statewide Acquisition. That portfolio did not consist of “*mortgage loans managed by BML*”;
  - (ii) Banksia had lent \$10,990,000 of its debentureholders’ funds to Securities HoldCo, its parent company, without any security whatsoever and that \$10,990,000 would ultimately be lost entirely because Securities Holdco would become insolvent; and
  - (iii) as a result of the BMF underwriting arrangement, Banksia was also investing its debentureholders’ funds in the effective underwriting of all of the impaired loans contained in the BMF loan portfolio;
- (c) contrary to the statement contained in paragraph 43(c), the “*relativity of maturing investments and loans*”, and “*the asset and liability mismatch*”, were not “*the focus of careful analysis and management*” by Banksia;
- (d) contrary to the statement contained in paragraph 43(d), as at 30 June 2011 Banksia did not have “*82 mortgage investments totalling \$110.9 million where arrears of interest payments are more than 30 days overdue*”. In truth and in fact:

- (i) Securities Holdco had purported to acquire \$5 million of the \$9.2 million loan which Banksia had originally made to One Spencer Street Pty Ltd, so as to disguise the amount of impairment which Banksia would need to disclose in respect of that loan (being a total impairment of only \$500,000 recorded in the Group Accounts as at 30 June 2009, of which Securities Holdco recorded \$271,739 and Banksia recorded \$146,739 of provisions on a total non-performing debt which at that time amounted to \$9.6 million);
  - (ii) further, contrary to the implicit representation made in the statement contained in paragraph 43(d), in light of the Banksia undisclosed matters, the 2011 Banksia Financial Matters and the 2011 Banksia Accounting Changes, the provision for bad and doubtful debts of \$4,146,000 was entirely inadequate;
- (e) contrary to the statement contained in paragraph 43(e), in light of the Banksia undisclosed matters, the 2010 Banksia Financial Matters, the 2010 Banksia Accounting Changes, the 2011 Banksia Financial Matters and the matters referred to in paragraph 43(a)-(d) above, in truth and in fact:
- (i) Banksia was not “*continuously monitoring changes in general economic and market conditions*”;
  - (ii) Banksia did not “*operate in accordance with a comprehensive risk management program, which was central to Banksia’s policy of continuous improvement*”;
  - (iii) there was no “*ongoing review of all identified risks to the operations of the Banksia Financial Group*”;
  - (iv) Banksia did not operate “*in accordance with practices and procedures that included appropriate due diligence during the loan assessment and credit approval process*”;

- (v) Banksia's risk management program did not involve "*regular meetings of all committees at which all sources of risk were identified and managed*";
  - (vi) the action which resulted from Banksia's so-called "*risk management program*" did not "*flow to policy and procedure adjustments throughout Banksia's operations*";
- (f) contrary to the statement contained in paragraph 43(f), in light of the BMF underwriting arrangement, the 2011 Banksia Financial Matters and the fact that Godfrey made all decisions about provisioning within Banksia and without regard to Australian Accounting Standards or any external advice, in truth and in fact, "*discretion*" was not "*applied in deciding the action to be taken and the timetable to apply to a default situation*";
- (g) contrary to the statement contained in paragraph 43(g), by reason of the existence of each of the Banksia undisclosed matters, the 2010 Banksia Financial Matters, the 2010 Banksia Accounting Changes, the 2011 Banksia Financial Matters and the matters alleged in paragraphs 43(a)-(f) above:
- (i) there did exist "*material items, transactions or events subsequent to*" 30 June 2011 "*and which require comment on, or adjustment to, the figures dealt with*" in the RSD "*report*"; and
  - (ii) the accounts published in Prospectus 18 were unreliable;
- (h) contrary to the statement contained in paragraph 43(h), in light of the Banksia undisclosed matters, the 2010 Banksia Financial Matters, the 2010 Banksia Accounting Changes, the 2011 Banksia Financial Matters and each of the matters alleged in paragraph 43(a)-(g) above:
- (i) the Directors were aware of circumstances which had or "*would materially affect the trading and profitability*" of Banksia;

- (ii) the Directors had no reasonable basis to form or to state the unqualified opinion that Banksia “*would continue to trade successfully in the coming year*”;
  - (iii) the Directors had no reasonable basis to form or to state the unqualified opinion that Banksia would remain “*in a position to meet, as they fell due, interest and principal payments on investments accepted under*” Prospectus 18.
46. Further, none of the Banksia undisclosed matters, the 2010 Banksia Financial Matters, the 2010 Banksia Accounting Changes, the 2011 Banksia Financial Matters or any of the matters alleged in paragraph 45 above were disclosed in Prospectus 18 and by reason of each item of non-disclosure, Prospectus 18 did not disclose all the information that investors and their professional advisers would reasonably require to make an informed assessment in relation to Banksia’s:
- (a) assets and liabilities;
  - (b) financial position;
  - (c) financial performance;
  - (d) profits and losses; and
  - (e) prospects,
- in breach of sections 710 and 728 Corporations Act.
47. Each of the statements in sub-paragraphs 43(c), (e), (f), (h), and (i) above was a statement about a future matter within the meaning of s 728(2) of the Corporations Act and accordingly Banksia is taken to have made a misleading statement about each of those matters because it did not have reasonable grounds for making those statements as a result of the matters which are alleged in paragraph 44 above.
48. By reason of the matters alleged in paragraphs 42-47 inclusive above, in publishing Prospectus 18, Banksia contravened section 728 of the Corporations Act, in that it

offered securities under a disclosure document that was likely to induce persons to apply for financial products (namely debentures) where the disclosure document:

- (a) contained misleading or deceptive statements (namely each of the statements alleged in paragraph 43 above); and
- (b) omitted material matters that were required to be disclosed to investors by section 710 of the Corporations Act, namely each of:
  - (i) the Banksia undisclosed matters;
  - (ii) the 2011 Banksia Financial Matters; and
  - (iii) the 2010 Banksia Accounting Changes;
- (c) when Banksia ought reasonably to have known that the statements alleged in paragraph 43 above were false in a material particular or materially misleading by reason of the matters alleged in paragraphs 44-47 inclusive above.

**(the 2011 Banksia Prospectus Contraventions)**

**Causation and loss in respect of the 2011 Banksia Prospectus Contraventions**

49. Following the publication of Prospectus 18, Banksia Group Members:
- (a) purchased Banksia debentures; and
  - (b) rolled over their existing Banksia debentures when they matured; and
  - (c) did not withdraw or seek to withdraw their investments in Banksia debentures;

**Particulars**

Bolitho rolled over his Banksia debentures following the publication of Prospectus 18 in the manner particularised in paragraph 1 above.

50. If the 2011 Banksia Prospectus Contraventions had not occurred, but instead the Banksia undisclosed matters, the 2010 Banksia Financial Matters, the 2010 Banksia Accounting Changes, the 2011 Banksia Financial Matters and the matters alleged in paragraph 45 above had been disclosed in the 2011 Banksia Prospectus, Banksia's poor financial position and its poor financial prospects following the Statewide Acquisition would have been publicly revealed in October 2011 and one or more of the events described in sub-paragraphs 27(a)-(h) above would then have occurred, with the consequence that Bolitho and the Banksia Group Members would have suffered less loss than they have in fact suffered as a result of the adverse effects alleged in sub-paragraphs 27(j) and (k) above continuing until October 2012. Those of the Banksia Group Members who invested after 2011 would not have invested at all in Banksia and would have suffered no loss.
51. By reason of the 2011 Banksia Prospectus Contraventions, Bolitho and the Banksia Group Members (being those who were adversely affected by the 2011 Banksia Prospectus Contraventions in the manner alleged in paragraph 50 above):
- (a) suffered loss and damage;

**Particulars**

The loss is the unpaid principal in respect of the Banksia debentures since 25 October 2012. Interest will be sought pursuant to the Supreme Court Act 1986 (Vic).

- (b) are entitled, pursuant to sections 729 and 1041I of the Corporations Act, to recover the loss or damage suffered by them from Banksia.

**Particulars**

Banksia published Prospectus 18.

**F. BANKSIA'S CONTRAVENTIONS OF s.283BB(a) OF THE CORPORATIONS ACT**

52. During the Banksia Relevant Period, Banksia failed to carry on or conduct the Banksia business in a proper and efficient manner in the following respects, which constituted contraventions of sections 283BB(a) and 912A(1)(a), (b) and (c) of the Corporations Act:

- (a) Banksia failed to disclose the 2009 Banksia Financial Matters to the public at any time;
- (b) Banksia failed to disclose the 2010 Banksia Financial Matters to the public at any time;
- (c) Banksia failed to disclose the 2011 Banksia Financial Matters to the public at any time;
- (d) Banksia failed to disclose the Banksia undisclosed matters to the public at any time;
- (e) Banksia failed to disclose the 2010 Banksia Accounting Changes to the public at any time;
- (f) Banksia undertook the Statewide Acquisition in the circumstances alleged in paragraphs 6-8 above;
- (g) Banksia rolled over and/or paid out the Statewide debentures at 100 cents in the dollar in the manner alleged in paragraph 10 above;
- (h) Banksia transferred the Statewide loans to itself in the manner alleged in paragraphs 11-14 above;
- (i) Banksia gave effect to the BMF underwriting arrangement alleged in paragraphs 15 and 16 above;

- (j) Banksia failed to properly account for the true state of its own financial position and its financial prospects and circumstances, having regard to the 2009 Banksia Financial Matters, the 2010 Banksia Financial Matters, the 2011 Banksia Financial Matters, the Banksia undisclosed matters and the 2010 Banksia Accounting Changes;
- (k) Banksia failed to properly account for or report to the public the steadily increasing level of impairment of its loan assets;
- (l) Banksia failed to institute or maintain a proper or adequate risk management program;
- (m) Banksia failed to effect and maintain and cause to be effected and maintained with a reputable insurer such insurances as would be effected by a prudent company engaged in a similar business, as it was required to do by clause 6.08(g) of the Banksia Trust Deed; and
- (n) Banksia failed to inform ASIC or Trust Co or any other person of any of the matters alleged in paragraphs (a)-(m) above, and that as a consequence of those matters, it was probable that the Banksia Trust Deed would not be fulfilled in that Banksia would become insolvent and be unable to repay its debentureholders the amounts that they were owed.

**Causation and loss in respect of Banksia's contraventions of s.283BB(a) of the Corporations Act**

53. If Banksia had not contravened s.283BB(a) of the Corporations Act in the ways alleged in paragraph 52 above:

- (a) the 2009 Banksia Financial Matters would have been disclosed to the public;
- (b) the 2010 Banksia Financial Matters would have been disclosed to the public;
- (c) the 2011 Banksia Financial Matters would have been disclosed to the public;
- (d) the Banksia undisclosed matters would have been disclosed to the public;

- (e) the 2010 Banksia Accounting Changes would have been disclosed to the public;
- (f) following disclosure of the matters alleged in sub-paragraphs (a)-(e) above, one or more of the events described in sub-paragraphs 27 (a)-(h) above would then have occurred, with the consequence that Bolitho and the Banksia Group Members would have suffered no loss (had those events occurred in 2009) or alternatively (had those events occurred after 2009 but before 25 October 2012) less loss than they have in fact suffered as a result of the adverse effects alleged in sub-paragraphs 27(j) and (k) above continuing until October 2012; and
- (g) Banksia would have effected and maintained with a reputable insurer such insurances as would have been effected by a prudent company engaged in a similar business (pursuant to clause 6.08(g) of the Banksia Trust Deed) with the consequence that Bolitho and the Banksia Group Members would have suffered no loss, or alternatively less loss, than they have in fact suffered by reason of the inadequate insurance which Banksia in fact effected and maintained.

54. Because of Banksia's contraventions of s.283BB(a) of the Corporations Act alleged in paragraph 52 above:

- (a) Bolitho and the Banksia Group Members have suffered loss and damage; and

#### **Particulars**

The loss is the unpaid principal in respect of the Banksia debentures since 25 October 2012. Interest will be sought pursuant to the Supreme Court Act 1986 (Vic).

- (b) pursuant to section 283F of the Corporations Act, Bolitho and the Banksia Group Members may recover the amount of the loss or damage from Banksia.

## **G. CLAIMS AGAINST TRUST CO**

### **G.1 Trust Co's obligations under section 283DA of the Corporations Act**

55. For the purposes of section 283DA of the Corporations Act, at all material times:

- (a) Trust Co was the trustee of the trust constituted and regulated by the Banksia Trust Deed;
  - (b) the Banksia Trust Deed was entered into (or taken to have been entered into) under section 283AA of the Corporations Act;
  - (c) Banksia was the relevant borrower.
56. At all material times, Trust Co had the following obligations under section 283DA of the Corporations Act:
- (a) to exercise reasonable diligence to ascertain whether the property of Banksia that was or should have been available (whether by way of security or otherwise) would be sufficient to repay the amounts deposited with or lent to Banksia when they became due;

**Particulars**

The obligation arose under section 283DA(a) of the Corporations Act.

- (b) to exercise reasonable diligence to ascertain whether Banksia had committed any breach of:
  - (i) the terms of the Banksia debentures;
  - (ii) the provisions of the Banksia Trust Deed; or
  - (iii) Chapter 2L of the Corporations Act (including relevantly sections 283BB and 283BF);

**Particulars**

The obligations arose under section 283DA(b) of the Corporations Act. The obligations under sub-paragraphs (b)(i) and (b)(ii) above also arose under clause 17.07 of the Banksia Trust Deed.

- (c) to notify ASIC as soon as practicable if Banksia had not complied with section 283BF of the Corporations Act.

### **Particulars**

The obligation arose under section 283DA(e)(i) of the Corporations Act.

## **G.2 Insufficiency of Banksia's property to repay debentureholders**

57. With respect to Trust Co's obligation alleged in paragraph 56(a) above, the property of Banksia that was or should have been available (whether by way of security or otherwise) was insufficient to repay the amounts deposited with or lent to Banksia in respect of the Banksia debentures when those amounts became due.

### **Particulars**

Banksia ceased to pay any amounts of principal or interest in respect of the Banksia debentures following the appointment by Trust Co of the Receivers and Managers on 25 October 2012. The Receivers and Managers have recently estimated that the loss of principal for Banksia debentureholders will be approximately 18 cents in each dollar owed to them, equating to a total loss in excess of \$100 million, not including interest.

## **G.3 Banksia's breaches of the Banksia Trust Deed**

58. With respect to Trust Co's obligations alleged in paragraph 56(b)(ii) above, there were terms of the Banksia Trust Deed (to the full terms and effect of which reference will be made and relied upon at trial), to the following effect:
- (a) Banksia would at all times comply with, observe and perform each and every covenant, obligation and condition expressly or impliedly contained in the Banksia Trust Deed, including the terms and conditions upon which debentures were issued (clause 6.01);
  - (b) Banksia covenanted with Trust Co that when Banksia debentures were to be redeemed or paid off in accordance with the terms of issue, Banksia would pay to Trust Co the principal to be paid off, together with the interest thereon (clauses 6.05 and 6.06);
  - (c) Banksia covenanted with Trust Co that it would, so long as any Banksia debentures were outstanding:

- (i) prior to an “Enforcement Date” (as defined), carry on and conduct its business in a proper and efficient manner and keep proper books of account (clause 6.08(a));
  - (ii) make available for inspection, or give to Trust Co or any auditor appointed by Trust Co, the whole of the accounting or other records in relation to the business, property, affairs or accounts of Banksia and its subsidiaries (clause 6.08(b));
  - (iii) effect and maintain and cause to be effected and maintained with a reputable insurer such insurances as would be effected by a prudent company engaged in a similar business as it was required to do (clause 6.08(g)); and
  - (iv) procure that Banksia’s directors notified Trust Co immediately they became aware that any of the provisions of the Banksia Trust Deed could not be fulfilled (clause 6.08(j));
- (d) whenever Banksia desired to issue any Banksia debentures it should notify Trust Co by a memorandum in writing of the amount of Banksia debentures it proposed to issue and furnish Trust Co with a report by Banksia’s auditor (**the Auditor’s Report**) which specified (as at a particular date):
- (i) having regard to the Banksia debentures on issue, what in the opinion of the auditor was the amount of Banksia debentures which could, as at a date stated in the report (being no more than one month prior to the date of the report) be issued by Banksia without breaching the limitations under the Banksia Trust Deed; and
  - (ii) that the auditor had not become aware of any material circumstances which would, if taken into account at the date the report was made, affect the amounts of Banksia debentures which might be issued without breaching the limitations under the Banksia Trust Deed,
- (clauses 7.01 and 7.02);

- (e) if Trust Co did not accept the Auditor's Report for any reason, or if Trust Co considered it desirable, it may within 7 days of receiving it give notice to Banksia requiring a Check Report from a firm of accountants appointed by Banksia and acceptable to Trust Co in order to confirm the Auditor's Report or, if not confirmed, provide details of the maximum amounts of debentures which could be issued without breaching the limitations under the Banksia Trust Deed (clause 7.03);
- (f) Any accountant or firm of accountants appointed by Banksia and acceptable to Trust Co to prepare a Check Report shall make every adjustment to the Last Audited Consolidated Balance Sheet which in his opinion is an adjustment necessary to make a proper determination of Total Tangible Assets or Total External Liabilities as at the date of the Check Report and such accountant or firm was not bound by any determination made by Banksia's auditor in the audit report (clause 7.06);
- (g) Banksia covenanted with Trust Co that it would not at any time issue any Banksia debentures or give or allow to exist any encumbrance over its property or assets if Banksia's "Total External Liabilities" (as defined) would thereupon equal or exceed ninety-seven percent (97%) of Banksia's "Total Tangible Assets" (as defined) (including the amount of the proceeds of the proposed issue, but without double counting) (clause 8.01);
- (h) For the purposes of the Banksia Trust Deed, Total Tangible Assets would be calculated in accordance with generally accepted accounting principles and where Trust Co was of the view that Total Tangible Assets as calculated by Banksia did not accord with generally accepted accounting principles, Trust Co could refer, at the cost of Banksia, the calculation to a firm of independent accountants operating throughout Australia for determination. For the avoidance of doubt, Total Tangible Assets could not include, among other matters, the amounts of Banksia's provisions for depreciation or bad and doubtful debts (Clause 8.02).

59. With respect to Trust Co's obligations alleged in paragraph 56(b)(ii) above, Banksia breached the Banksia Trust Deed during the Banksia Relevant Period in that:

- (a) Banksia did not comply with and observe and perform each and every covenant, obligation and condition expressly or impliedly contained in the Banksia Trust Deed, including the terms and condition upon which debentures were issued (breach of clause 6.01);

**Particulars**

Banksia did not carry on and conduct its business in a proper and efficient manner or keep proper books of account in the respects alleged in paragraph 52 above, in breach of clause 6.08.

Banksia failed to repay any Banksia debentures and failed to pay any instalments of interest due on and after 25 October 2012.

- (b) Banksia did not pay to the Banksia debenture holders or to Trust Co the principal to be paid off, together with the interest thereon (breach of clauses 6.05 and 6.06);

**Particulars**

Banksia failed to repay any Banksia debentures and failed to pay any instalments of interest due on and after 25 October 2012.

- (c) Banksia did not whilst Banksia debentures were outstanding during the Banksia Relevant Period:

- (i) carry on and conduct its business in a proper and efficient manner and keep proper books of account (breach of clause 6.08(a)); or
- (ii) procure that Banksia's directors notified Trust Co immediately they were aware that any of the provisions of the Banksia Trust Deed could not be fulfilled (breach of clause 6.08(j));

**Particulars**

- (i) The plaintiff refers to the matters alleged in paragraphs 6-16, 21-25, 29-31, 34-38, 44-48 and 52above;
- (ii) It is reasonable to infer, having regard to the matters alleged in paragraphs 6-16, 21-25, 29-31, 34-38, 44-48 and 52above, that the Directors were aware at all times during the Banksia Relevant Period of facts which disclosed that clauses 6.08(a) and 8.01 of the Banksia Trust Deed were being breached.

- (d) Banksia did not, whenever it desired to issue any Banksia debentures, provide Trust Co a memorandum in writing of the amount of Banksia debentures it proposed to issue and a report by Banksia’s auditor which specified (as at a particular date):
- (i) having regard to the Banksia debentures on issue, what in the opinion of the auditor was the amount of Banksia debentures which could, as at a date stated in the report (being no more than one month prior to the date of the report) be issued by Banksia without breaching the limitations under the Banksia Trust Deed; and
  - (ii) that the auditor had not become aware of any material circumstances which would if taken into account at the date the report is made, affect the amount of Banksia debentures which may be issued without breaching the limitations under the Banksia Trust Deed,

(breach of clauses 7.01 and 7.02);

### **Particulars**

Warren Sinnott (on behalf of RSD) sent reports to Stenick Silavecky (of Trust Co) under clauses 7.01 and 7.02 of the Banksia Trust Deed on the following dates

<b>RCB Ref.</b>	<b>Date of RSD letter</b>	<b>‘As at’ date of calculation</b>	<b>Greater than 1 month?</b>
V5.120	23 March 2009	31 December 2008	Yes
V5.122	24 September 2009	30 June 2009	Yes
V5.124	25 February 2010	31 December 2009	Yes
V5.126	30 September 2010	30 June 2010	Yes
V5.128	24 February 2011	31 December 2010	Yes
V5.130	29 September 2011	30 June 2011	Yes
V5.133	23 February 2011 (scil. 2012)	31 December 2011	Yes
V5.134	20 September 2012	31 August 2012	No

- (e) Banksia issued Banksia debentures during the Banksia Relevant Period in circumstances where Banksia’s “Total External Liabilities” (as defined)

exceeded ninety-seven percent (97%) of Banksia's "Total Tangible Assets" (as defined) in breach of clause 8.01 of the Banksia Trust Deed.

### **Particulars**

Banksia issued debentures continuously throughout the Relevant Period, notwithstanding the existence at relevant times of the 2009 Banksia Financial Matters, the 2010 Banksia Financial Matters, the 2011 Banksia Financial Matters, the Banksia undisclosed matters, the BMF underwriting arrangement and the 2010 Banksia Accounting Changes, which matters had the effect that the "Total External Liabilities" of Banksia exceeded 97% of the "Total Tangible Assets" of Banksia during the whole of the Banksia Relevant Period.

- (f) Banksia did not effect and maintain and cause to be effected and maintained with a reputable insurer such insurances as would be effected by a prudent company engaged in a similar business as it was required to do by clause 6.08(g) of the Banksia Trust Deed.

### **G.4 Banksia's breaches of Chapter 2L of the Corporations Act: s.283BF**

60. Banksia was obliged, within 1 month of the end of each quarter, to give Trust Co a report setting out, inter alia, any circumstances that had occurred during that quarter that materially prejudiced Banksia.

### **Particulars**

The obligation arose under section 283BF(4)(c)(i) of the Corporations Act.

61. Between 30 July 2009 and 25 July 2012, Banksia issued Quarterly Directors' Certificates to Trust Co (**the Quarterly Directors' Certificates**).

### **Particulars**

The Quarterly Directors' Certificates comprised letters that were addressed to Trust Co dated 30 July 2009 (V9.020), 26 October 2009 (V9.025), 28 January 2010 (V9.030), 27 April 2010 (V9.035), 23 July 2010 (V9.041), 26 October 2010 (V9.046), 21 January 2011 (V9.051), 28 April 2011 (V9.056), 28 July 2011 (V9.061), 27 October 2011 (V9.066), 25 January 2012 (V9.071), 19 April 2012 (V9.076) and 25 July 2012 (V9.081).

## 62. The Quarterly Directors' Certificates:

- (a) did not refer to any of the 2009 Banksia Financial Matters;
- (b) did not refer to any of the 2010 Banksia Financial Matters;
- (c) did not refer to any of the 2011 Banksia Financial Matters;
- (d) did not refer to the effect upon Banksia of the Statewide Acquisition;
- (e) did not refer to the Banksia undisclosed matters;
- (f) did not refer to the 2010 Banksia Accounting Changes in respect of those calculations made after 30 June 2010;
- (g) stated that no circumstances had arisen that materially prejudiced Banksia, any of its subsidiaries or any of the guarantors or any security or charge included in or created by the debentures or the Banksia Trust Deed;
- (h) stated that there had been no substantial change in the nature of the business of Banksia, or any of its subsidiaries, notwithstanding the occurrence of the Statewide Acquisition;
- (i) stated that Banksia was not aware of any other matters that may have materially prejudiced any security or the interests of the debentureholders;
- (j) stated that Banksia had complied in all respects with its obligations under Chapter 2M of the Corporations Act;
- (k) stated that Banksia had made all necessary disclosures against benchmarks in its disclosure documents and all disclosures remained true and correct;
- (l) stated that there had been no change in any accounting method or method of valuation of assets or liabilities and no circumstances had arisen which rendered adherence to the existing method of valuation of assets and liabilities misleading or inappropriate, notwithstanding that:

- (i) Banksia's Prospectuses 14 (dated 9 November 2007) and 15 (dated 27 November 2008) stated:

*"A valuation of a property involving construction activity is required to contain both a current 'as is' market value and an assessment of the 'cost to complete'."*

whereas Banksia's Prospectuses 16, 17 and 18 stated:

*"A valuation of a property involving construction activity is required to contain both a current 'as is' market value and an assessment of the 'valuation on completion'."*

- (ii) the 2010 Banksia Accounting Changes affected Banksia's accounts as from 30 June 2010; which matters constituted changes in accounting methods or methods of valuation of assets or liabilities and also constituted circumstances which had arisen which rendered adherence to the existing method of valuation of assets and liabilities misleading or inappropriate;

- (m) stated that the then current assets of Banksia appeared in the relevant books at values which in the opinion of the Directors were realisable in the ordinary course of business.

63. By reason of the matters alleged in paragraph 62 above, the Quarterly Directors' Certificates provided by Banksia to Trust Co under section 283BF of the Corporations Act failed to set out:

- (a) the circumstances that had occurred during each relevant quarter that materially prejudiced Banksia (namely the matters alleged in sub-paragraphs 62(a) to (f) above); and/or
- (b) the substantial changes in the nature of the business of Banksia that had occurred during the quarter (namely the matters alleged in sub-paragraphs 62(a) – (f) and (l) above);

and Banksia thereby contravened s.283BF of the Corporations Act.

### Particulars

Banksia did not provide any quarterly report to Trust Co at any time that referred to any of the 2009 Banksia Financial Matters, the 2010 Banksia Financial Matters, the 2011 Banksia Financial Matters, the Banksia undisclosed matters, the BMF underwriting arrangement, the effect upon Banksia of the Statewide Acquisition or the 2010 Banksia Accounting Changes after each of those matters had occurred or arisen.

#### **G.5 Trust Co's breaches of its obligations under section 283DA of the Corporations Act**

64. During the Banksia Relevant Period, Trust Co had the following powers to investigate, ascertain and take action in respect of the matters alleged in paragraphs 9-14, 52, 59, 62 and 63 above:
- (a) to appoint an investigating accountant:
    - (i) under clause 6.08(b) of the Statewide Trust Deed and/or clause 6.08(b) of the Banksia Trust Deed to investigate Statewide's and/or Banksia's books, accounts and records and to report to Trust Co as trustee; and/or
    - (ii) to prepare a check report to confirm the auditor's report pursuant to clause 7.03 of the Banksia Trust Deed and/or clause 7.03 of the Statewide Trust Deed; and/or
    - (iii) to make necessary adjustments to the last audited consolidated balance sheet for Banksia and/or Statewide pursuant to clause 7.06 of the Banksia Trust Deed and/or clause 7.06 of the Statewide Trust Deed; and/or
    - (iv) to make a proper determination of the total tangible assets of Statewide and/or Banksia pursuant to clause 8.02 of the Banksia Trust Deed and/or clause 8.02 of the Statewide Trust Deed;
  - (b) to enforce the charges over all of the assets of Banksia and Statewide created by clause 10.01 of the Banksia Trust Deed and clause 10.01 of the Statewide Trust Deed pursuant to clause 12.01(f) of the Banksia Trust Deed and clause 12.01(f) of the Statewide Trust Deed respectively;

- (c) to appoint receivers and managers to all of the property of Banksia and Statewide respectively pursuant to clause 15 of the Banksia Trust Deed and clause 15 of the Statewide Trust Deed;
- (d) to make application to the Court for orders pursuant to section 283HB(1) of the Corporations Act, for example that:
  - (i) the security for the debentures under the Statewide Trust Deed and/or the Banksia Trust Deed (i.e., the charges created by each Deed) be enforceable immediately; and/or
  - (ii) a receiver be appointed to Banksia and/or Statewide; and/or
  - (iii) any other order that the Court considered appropriate to protect the interests of Banksia debenture holders;
- (e) to make application to the Court pursuant to section 283HA of the Corporations Act for directions in relation to the performance of its functions as trustee under the Statewide Trust Deed and/or the Banksia Trust Deed in light of the matters alleged in paragraphs 52, 59, 62 and 63 above;
- (f) to decline to be named in any of Prospectuses 16, 17 or 18 unless it was satisfied that none of those prospectuses contained any of the errors or omissions that are alleged in paragraphs 21-23, 29-31, 34-36 and 44-46 above;

### **Particulars**

Anthony Evans of Trust Co threatened Banksia on 17 September 2009 (TCN.501.010.7578) that Trust Co would not give its consent to be named in Banksia Prospectus 16 (issued in 2009) unless Banksia addressed comments and criticisms of the draft prospectus that Gadens Lawyers (Trust Co's solicitors) had sent to Banksia. Despite the fact that Banksia did not address Gadens' comments and criticisms, Trust Co consented to be named in Prospectus 16 (as it did in respect of all subsequent Banksia prospectuses until Banksia collapsed in 2012).

- (g) to require Banksia to effect and maintain and cause to be effected and maintained with a reputable insurer such insurances as would be effected by

a prudent company engaged in a similar business pursuant to clause 6.08(g) of the Banksia Trust Deed.

- 64A. Trust Co knew the following matters, which it ought to have acted upon in the performance of its statutory obligations under s.283DA(a) of the Corporations Act and in the performance of its equitable obligations as trustee:
- (a) as at 31 December 2008, Statewide's Total External Liabilities were valued in its accounts at 98.37% of its Total Tangible Assets (Fisher Report: V4.053), meaning that Statewide's capital adequacy was substantially below that prescribed by clause 8.01 of the Banksia Trust Deed;
  - (b) Statewide's Total External Liabilities as at 31 December 2008 (largely comprising Statewide's debenture liabilities) were valued at \$372 million, whereas Banksia's Total External Liabilities as at 31 December 2008 (also largely comprising Banksia's debenture liabilities) were valued at \$333 million, which meant that if Statewide's debenture liabilities were merged with Banksia's (as was proposed pursuant to the Statewide Acquisition, and as in fact occurred), it was highly probable that Banksia's liability to asset ratio would be materially adversely affected (which at that time Banksia had reported to Trust Co was 95.3%, being only 1.7% below the maximum of 97% allowed by clause 8.01 of the Banksia Trust Deed);
  - (c) there had been a widespread, marked and serious deterioration in worldwide and Australian economic conditions during the 18 months prior to the Statewide Acquisition, and there had also been rapid adverse changes in worldwide and Australian financial and property markets during that period, all of which conditions were continuing in March 2009, as was recognised by Trust Co in the documents which are particularised below (in which Trust Co described these adverse conditions as "the financial crisis");
  - (d) the Statewide Acquisition occurred in March 2009 without the prior knowledge or consent of Trust Co and it therefore constituted an event of default under clause 12.01(k) of the Statewide Trust Deed;

- (e) despite (d) above, and the fact that Trust Co was informed about the Statewide Acquisition when it occurred in March 2009, Trust Co made no effort to communicate with Banksia or with Statewide about the Statewide Acquisition, or to raise any objection to, or ask any question about, the Statewide Acquisition, until 7 April 2009;
- (f) two weeks later, on 21 April 2009, Trust Co first complained to Banksia that neither Statewide nor Banksia had informed Trust Co about the proposed Statewide Acquisition and that, as a result, Trust Co intended to give formal notice alleging a failure by Statewide to comply with the requirements of the Statewide Trust Deed in respect of the Statewide Acquisition;
- (g) on 30 April 2009, Statewide provided a Quarterly Directors' Certificate to Trust Co for the period ending 31 March 2009, which stated that:
  - (i) on 30 March 2009, Statewide had become a wholly-owned subsidiary of Securities Holdco Ltd (Banksia's parent company);
  - (ii) the last Statewide prospectus had expired on 28 March 2009 and a new prospectus was not lodged by Statewide with ASIC and accordingly the receipt of new debenture funds by Statewide had ceased on 28 March 2009;
  - (iii) despite (ii) above, Statewide had not ceased its operations and would continue to "*trade down in accordance with its trust deed and its Australian Financial Services Licence*";
  - (iv) Statewide had incurred a material trading loss in the period ending 31 March 2009 of \$6.8 million before tax, largely due to the increase in Statewide's provision for impairment of loans and receivables of \$4.3M;
- (h) representatives of Banksia and Trust Co met at least twice during 2009 and significant parts of the discussions were the true state and the true value of Statewide's loan book and the potential adverse impact of Statewide's loans on Banksia having regard to the fact that it was proposed to transfer to Banksia all

of Statewide's loan assets in exchange for the payment out in full or rollover to Banksia of all of Statewide's outstanding debenture liabilities in the manner alleged in paragraphs 9-14 above;

- (i) despite Trust Co's communications with Banksia alleged in sub-paragraphs (d), (e) and (h) above and Trust Co's threat alleged in sub-paragraph (f) above, Trust Co took no action at any time during the Banksia Relevant Period to enforce any of the matters alleged in sub-paragraph (d) above and no notice was ever given by Trust Co to Banksia or Statewide of the sort threatened in sub-paragraph (f) above.

### Particulars

As to sub-paragraph (a): financial report prepared by Alan Fisher (**the Fisher Report: V4.053**);

As to sub-paragraph (b): the Fisher Report: V4.053, also V2.139f. and V9.145;

As to sub-paragraph (c): documents V21.202f.; TCN.0010.004.0045; TCN.001.004.0016; TCN.001.004.0039;

As to sub-paragraph (e), email from Anthony Evans of Trust Co to Dan Fitzgerald of Banksia dated 7 April 2009: V4.243.

As to sub-paragraph (f): email from Anthony Evans of Trust Co to Dan Fitzgerald of Banksia dated 21 April 2009: V4.242.

As to sub-paragraph (g): Statewide Quarterly Directors' Certificate for period ended 31 March 2009, dated 30 April 2009: V4.250 – 255.

As to sub-paragraph (h): evidence of Daniel Fitzgerald T219.23f., V4.362f. There was a meeting on 30 April 2009 at Trust Co's office at 530 Collins Street, Melbourne (TCN.001.016.0019). Silavecky, Evans and Lefort attended from Trust Co. Godfrey, Santilla and Fitzgerald attended from Banksia. The agenda included (item 2): "*Potential default under the [Statewide] Trust Deed*"; (item 6): "*Commercial issues and consideration of Banksia's plans for Statewide*"; (item 10) "*Consider possible implications of Statewide and [Statewide Secured Investments] collapses for ASIC scrutiny. The failure of Statewide to formally advise the Trustee is of concern and is a risk to both Banksia and the Trustee in regard to due process and compliance*".

- 64B. In breach of Trust Co's obligation under s.283DA(a) of the Corporations Act (alleged in paragraph 56(a) above), despite the fact that it had knowledge of all the matters

alleged in paragraph 64A above, Trust Co did not at any time during the Banksia Relevant Period:

- (a) exercise any of its powers identified in paragraph 64 above; or
- (b) enquire into the question whether, or take any steps to investigate or ascertain the fact that, Banksia was uninsured altogether (for the reasons alleged in Banksia's Third Party Notice dated 26 June 2015 brought against Insurance House Pty Ltd) in respect of the kind of losses to its debentureholders which have occurred in this case;

and Trust Co thereby failed to exercise reasonable diligence to ascertain whether the property of Banksia that was or should have been available (whether by way of security or otherwise) was likely to be sufficient to repay the amounts deposited with or lent to Banksia when they became due.

64C. In breach of Trust Co's obligation under s.283DA(b) of the Corporations Act (alleged in paragraph 56(b) above), despite the fact that it had knowledge of all the matters alleged in paragraph 64A above, during the Banksia Relevant Period Trust Co failed to exercise reasonable diligence to ascertain whether Banksia had committed any breach of the Banksia Trust Deed, in particular those breaches of the Banksia Trust Deed alleged in paragraph 59 above by failing to:

- (a) exercise any of its powers identified in paragraph 64 above; or
- (b) ask Banksia to explain and justify the matters alleged in paragraphs 6-17, 21 - 23, 29-31, 34-36, 44-46, 52 and 59 above.

64D. In breach of Trust Co's obligation under s.283DA(b) of the Corporations Act (alleged in paragraph 56(b) above), despite the fact that it had knowledge of all the matters alleged in paragraph 64A above, during the Banksia Relevant Period Trust Co failed to exercise reasonable diligence to ascertain whether Banksia had committed any breach of its obligation to carry on and conduct its business in a proper and efficient manner in accordance with Banksia's obligations under section 283BB of the

Corporations Act, in particular those breaches by Banksia which are alleged in paragraph 52 above, by failing to:

- (a) exercise any of its powers identified in paragraph 64 above; or
- (b) ask Banksia to explain and justify the matters alleged in paragraphs 6-17, 21 - 23, 29-31, 34-36, 44-46, 52 and 59 above.

64E. In breach of Trust Co's obligation under s.283DA(b) of the Corporations Act (alleged in paragraph 56(b) above), despite the fact that it had knowledge of all the matters alleged in paragraph 64A above, during the Banksia Relevant Period Trust Co failed to exercise reasonable diligence to ascertain whether Banksia had breached its obligation under s.283BF of the Corporations Act to provide quarterly reports as alleged in paragraphs 62 and 63 above by failing to exercise any of its powers identified in paragraph 64 above.

64EA. In breach of Trust Co's obligation under s.283DA(b) of the Corporations Act (alleged in paragraph 56(b) above), by not enquiring into the question whether, or taking any steps to investigate or ascertain the fact that, Banksia was uninsured altogether in respect of the kind of losses to its debentureholders which have occurred in this case (for the reasons alleged in Banksia's Third Party Notice dated 26 June 2015 brought against Insurance House Pty Ltd), Trust Co failed to exercise reasonable diligence to ascertain whether Banksia had breached its obligation under clause 6.08(g) of the Banksia Trust Deed by failing to effect and maintain and cause to be effected and maintained with a reputable insurer such insurances as would be effected by a prudent company engaged in a similar business.

64F. In breach of Trust Co's obligation under s.283DA(e) of the Corporations Act (alleged in paragraph 56(c) above), despite the fact that it had the knowledge of all the matters alleged in paragraph 64A above, throughout the Banksia Relevant Period Trust Co failed to notify ASIC as soon as practicable (or at all) of Banksia's failure to comply with s.283BF of the Corporations Act, as alleged in paragraphs 60-63 above.

**G.6 Trust Co's breaches of trust by failing to protect the trust property under the Banksia Trust Deed and to vindicate the rights attaching to it.**

- 64G. Pursuant to the Banksia Trust Deed, Trust Co was at all material times the trustee of the trust property constituted by the Banksia Trust Deed (**the Banksia Debenture Trust Property**), including the first ranking floating charge created by clause 10.01 of the Banksia Trust Deed, which charged for the benefit of Banksia's debenture holders the whole of Banksia's undertaking and all of Banksia's real and personal property and assets and rights whatsoever and wheresoever, both present and future, including its uncalled and called but unpaid capital, with the payment of the moneys secured by the Banksia Trust Deed.
- 64H. In its capacity as trustee, Trust Co was under a duty to protect the Banksia Debenture Trust Property and to vindicate the rights attaching to it.

**Particulars**

The duty is imposed by the law of trusts pursuant to the principle recognised by the High Court of Australia in *CGU Insurance Ltd v One Tel Ltd (in liq.)* (2010) 242 CLR 174 at [36] (*per curiam*).

- 64I. By failing to exercise any of its powers identified in paragraph 64 above at any time during the Banksia Relevant Period and by breaching its obligations in each of the ways alleged in paragraphs 64B–64F above, Trust Co failed to perform its duty to protect the Banksia Debenture Trust Property and to vindicate the rights attaching to it and thereby acted in breach of trust.
- G.7 Trust Co's breaches of fiduciary duty and of the Corporations Act by allowing itself to be placed in a position of conflict in respect of the Statewide Acquisition and by remaining in a position of conflict continuously thereafter**
- 64J. Trust Co had fiduciary duties under the general law of trusts and it also had statutory duties under s.283AC(2) of the Corporations Act not to allow itself to be placed in or to remain in a position of conflict in respect of the Statewide Acquisition, because it was

at the time of the acquisition and it remained at all material times thereafter the trustee of both the Statewide Debenture Trust Deed and the Banksia Debenture Trust Deed.

### Particulars

Trust Co's duties to avoid any conflict of interest or duty while acting as a trustee appointed pursuant to section 283AA(1) of the Corporations Act arose both under section 283AC(2) of the Corporations Act and pursuant to its fiduciary obligations as trustee under the general law (which subsisted pursuant to section 283AC(2) of the Corporations Act): *Breen v Williams* [1996] HCA 57; (1996) 186 CLR 71 at 113, per Gaudron and McHugh JJ, and at 137, per Gummow J.

- 64K. As to Trust Co's conflicts of duty, at all material times, in respect of each of its roles as trustee for the debentureholders of Banksia and Statewide respectively, Trust Co had the statutory obligations pursuant to section 283DA of the Corporations Act which are alleged in paragraph 56 above and the fiduciary obligations as trustee which are alleged in paragraph 64H above.
- 64L. Those obligations included (as alleged in paragraphs 56 and 64H above) that Trust Co:
- (a) exercised reasonable diligence to ascertain whether the property of Banksia and Statewide respectively would be sufficient to repay all amounts deposited with or lent to Banksia and Statewide respectively when those amounts became due and payable, as required by section 283DA(a) of the Corporations Act;
  - (b) exercised reasonable diligence to ascertain whether Banksia or Statewide respectively had committed any breaches of the terms of their debentures or their trust deeds respectively, or Chapter 2L of the Corporations Act;
  - (c) did everything in its power to ensure that Banksia and Statewide respectively or their respective guarantors remedied any breach of any term of their respective debentures or their respective trust deeds, or Chapter 2L of the Corporations Act, unless Trust Co was satisfied that the breach would not materially prejudice the relevant debenture holders' interests or any security for the relevant debentures; and
  - (d) protected the trust property of each trust and vindicated the rights attaching to it, including the Banksia Debenture Trust Property, as alleged in paragraph 64H above.

- 64M. The Statewide Acquisition placed Trust Co in a position in which it owed identical duties to the debenture holders of both Banksia and Statewide, in circumstances where:
- (a) the performance of the obligations owed by each of Banksia and Statewide to their respective debenture holders (including all of the obligations imposed upon them by the covenants which they had given to Trust Co under their respective debenture trust deeds) were secured over the separate pools of property owned by Banksia and Statewide respectively;
  - (b) those separate pools of property owned by Banksia and Statewide were charged in favour of Trust Co pursuant to the Statewide and Banksia debenture trust deeds (including the loans advanced to borrowers by each of Statewide and Banksia out of the funds advanced to them by their respective debenture holders); and
  - (c) the Statewide Amalgamation was to the disadvantage of the debenture holders of Banksia in the ways alleged in paragraphs 10-14 and 64A above;
- and accordingly the Statewide Amalgamation gave rise to a conflict between the interests of the debenture holders of Banksia and Statewide respectively and a corresponding conflict of duties for Trust Co as the trustee for each group of debenture holders.

#### **Particulars**

The plaintiff refers to the matters alleged and particularised in paragraphs 10-14 and 64A above.

- 64N. Trust Co knew that the Statewide Acquisition was predicated upon, and in fact proceeded by, the payment by Banksia to the Statewide debenture holders of the full face value (i.e. 100 cents in every dollar) of the Statewide debentures owned by them, either by payments in cash by Banksia or by Banksia rolling over the Statewide debentures at their face value and replacing them with Banksia debentures on a one-for-one basis.

#### **Particulars**

As to the payments and rollovers, the plaintiff refers to the matters alleged and particularised in paragraphs 10-14 above. As to Trust Co's knowledge, the plaintiff refers to the matters alleged and particularised in 64A above, from which it may be inferred that Trust Co had the knowledge alleged.

64O. By allowing Banksia to make the payments to the Statewide debenture holders and to roll over the Statewide debentures in the manner which is alleged in paragraph 64N above, Trust Co permitted the interests of the Banksia debenture holders to be prejudiced and the interests of the Statewide debenture holders to be advanced, in breach of its fiduciary duty.

### **Particulars**

The plaintiff refers to the matters alleged and particularised in paragraphs 10-14 inclusive above.

64P. Trust Co breached its obligations under section 283AC(2) of the Corporations Act and acted contrary to the interests of the Banksia debenture holders and in breach of its fiduciary duties in the ways alleged in paragraphs 64M – 64O above, including in particular by its failure to act:

- (a) on its knowledge of the matters alleged in paragraphs 64A and 64N above; and
- (b) to prevent or require the remediation of the matters alleged in paragraphs 9-14 above.

### **Causation and loss arising from Trust Co's breaches of sections 283AC(2) and 283DA**

65. If Trust Co had not breached its obligations under sections 283AC(2) and 283DA of the Corporations Act in the ways alleged in paragraphs 64B-64F and 64J-64P above, but instead had resigned as trustee for either or both of the Statewide or Banksia debentureholders (so as to avoid a breach of s.283AC(2)), or had taken action of the sorts alleged in paragraph 64 above, then one or more of the things alleged in sub-paragraphs 27(a)-(h) above would have occurred, with the consequence that Bolitho and the Banksia Group Members would have suffered no loss (had sub-paragraph 27(i) occurred in 2009), alternatively less loss than they have in fact suffered as a result of the adverse effects alleged in sub-paragraphs 27(j) and (k) above continuing until October 2012.

### **Particulars**

The plaintiff refers to the matters alleged and particularised under para 27 above.

66. Further or alternatively, had Trust Co not breached its obligation under s.283DA of the Corporations Act as alleged in paragraph 64EA above in respect of Banksia's breach of clause 6.08(g) of the Banksia Trust Deed by failing to effect and maintain or cause to be effected and maintained with a reputable insurer such insurances as would be effected by a prudent company engaged in a similar business, Banksia would have effected and maintained such insurance and that insurance would have responded to the debentureholders' claims made against Banksia in this case and they would have suffered no loss, alternatively less loss.

### **Particulars**

The insurance cover which Banksia could and should have effected and maintained under clause 6.08(g) of the Banksia Trust Deed will be the subject of expert evidence at trial.

67. Because Trust Co contravened sections 283AC(2) and s.283DA of the Corporations Act in the ways alleged in paragraphs 64B-64F and 64J-64P above, Bolitho and the Banksia Group Members:
- (a) have suffered loss and damage; and
  - (b) are entitled, pursuant to section 283F of the Corporations Act, to recover the loss and damage suffered by them from Trust Co.

### **Particulars**

The plaintiff refers to the matters alleged and particularised under para 34 above. The loss is the shortfall of repayments of principal in respect of the Banksia debentures since 25 October 2012. Interest will be sought pursuant to the Supreme Court Act 1986 (Vic).

## **G.8 Claim for equitable compensation for Trust Co's breaches of fiduciary duties**

68. Trust Co's breaches of its fiduciary duties:
- (a) to protect the Banksia Debenture Trust Property and to vindicate the rights attaching to it in each of the ways alleged in paragraphs 64G-64I above; and

(b) by allowing itself to be placed in and by remaining in a position of conflict in respect of the Statewide Acquisition as alleged in paragraphs 64J-64P above; have caused all of the losses suffered by Bolitho and the Banksia Group Members which are alleged in paragraph 67 above because if Trust Co had not breached those duties in the ways alleged but instead had resigned as trustee for either or both of the Statewide or Banksia debentureholders (so as to avoid being placed in or remaining in a position of conflict in respect of the Statewide Acquisition), or had taken action of the sorts alleged in paragraph 64 above, then one or more of the things alleged in sub-paragraphs 27(a)-(h) above would have occurred, with the consequence that Bolitho and the Banksia Group Members would have suffered no loss (had sub-paragraph 27(i) occurred in 2009), alternatively less loss than they have in fact suffered as a result of the adverse effects alleged in sub-paragraphs 27(j) and (k) above continuing until October 2012.

69. Bolitho and the Banksia Group Members are entitled to equitable compensation as a result of Trust Co's breaches of its fiduciary duties to protect the Banksia Debenture Trust Property and to vindicate the rights attaching to it in the ways alleged in paragraphs 64G-64I above and by allowing itself to be placed in and by remaining in a position of conflict in respect of the Statewide Acquisition as alleged in paragraphs 64J-64P above.

### **Particulars**

The measure of equitable compensation is the shortfall of repayments of principal in respect of the Banksia debentures since 25 October 2012 plus all amounts earned by Trust Co from Banksia or Statewide following the Statewide Amalgamation, including any amount which is paid to Trust Co as a result of the application made by the receivers on 17 December 2015 in matter number S ECI 2015 000465. Interest will be sought pursuant to the Supreme Court Act 1986 (Vic).

### **AND THE PLAINTIFF CLAIMS ON HIS OWN BEHALF AND ON BEHALF OF THE BANKSIA GROUP MEMBERS:**

A. As against Banksia:

(1) Declarations that Banksia has contravened sections 728 and 1041E of the Corporations Act.

- (2) Damages pursuant to sections 729 and/or 1041I of the Corporations Act.
- (3) Declarations that Banksia has contravened sections 283BB(a) and 912A of the Corporations Act.
- (4) Damages pursuant to section 283F of the Corporations Act.
- (5) Interest pursuant to statute.
- (6) Costs.
- (7) Such further or other order as the Court considers fit.

B. As against Trust Co:

- (1) Declarations that Trust Co has contravened sections 283AC(2) and 283DA of the Corporations Act.
- (2) Damages pursuant to section 283F of the Corporations Act in respect of Trust Co's contraventions of sections 283AC(2) and 283DA of the Corporations Act.
- (3) Declarations that Trust Co failed to perform its equitable duty to protect the Banksia Debenture Trust Property and to vindicate the rights attaching to it and breached its fiduciary duty by allowing itself to be placed in and by remaining in a position of conflict in respect of the Statewide Acquisition, and thereby acted in breach of trust.
- (4) Equitable compensation for breaches of trust, including all amounts earned by Trust Co from Banksia or Statewide following the Statewide Amalgamation, including any amount which is paid to Trust Co as a result of the application made by the receivers on 17 December 2015 in matter number S ECI 2015 000465.
- (5) Interest pursuant to statute.
- (6) Costs.

- (7) Such further or other order as the Court considers fit.

**NORMAN O'BRYAN SC**

**MICHAEL SYMONS**

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**Portfolio Law**

Solicitor for the plaintiff and the  
Banksia Group Members